Outline of Argument.

PAGE

Statement 1
Assignments of Error 8
Issues on the Appeal 9

Argument:

I The source of power to construct a bridge over navigable waters wholly within one State is in the State itself; the federal regulations are permissive only 12

1. The *International Bridge* case..... 12

2. The War Department's own view concerning the present state of the law, as evidenced by an opinion of the Judge Advocate-General given in 1922..... 20
—the phrase "lawful structure"..... 22

3. The doctrine that the federal regulations are permissive only has been enunciated in a number of judicial decisions 24

II The concurrent consent of both State and Federal Governments is necessary before a bridge over navigable waters wholly within one State may be lawfully erected 27

1. General principles 28

2. The doctrine of concurrent authorization had been firmly established by decisions of this Court prior to 1906 31

3. The trend of legislation in Congress since 1880 on the subject of bridges over navigable waters shows consistently a purpose to aid navigation; the development of land commerce has been either subordinated to navigation in these statutes or ignored altogether.. 35

4. There is absent from the Bridge Act of 1906 any expression of an intent so to change the law as to dispense with State assent. This appears from:

A. The legislative history of the Act..... 41

B. Decisions subsequent to its enactment.... 48

PAGE

III An intent to supersede State laws will not be imputed to Congress unless clearly manifested and necessary to the attainment of the federal purpose 54

IV The construction of bridges over navigable waters is a matter requiring not a uniform rule but rather "that diversity which alone can meet the local necessities of navigation" (*Cooley* v. *Port Wardens*) 59

V The construction of the Act of 1906 contended for is the only one consistent with the Constitution 65

1. The nature of local, or State, sovereignty in lands under water 65
2. The power of Congress over navigable waters is limited to their improvement for purposes of navigation, including the *removal* of obstructions 70
3. The failure of Congress to make any provision for just compensation makes it impossible to argue that there has been a valid exercise of the power of eminent domain in the case at bar 74

VI The Special Acts of 1919 and 1921 show no intention of dispensing with the necessity of State approval, and must be construed as merely granting Federal consent without impairing State powers 77

VII Congress, by creating and adopting as its instrumentality the Port of New York Authority, qualified the license granted to the Central Railroad Company of New Jersey by imposing, as an additional requirement, the approval of that body 81

Summary 85

Appendices:

1. Committee Report on Bridge Bill of 1906..... 89
2. Debate in the House on Bridge Bill of 1906..... 92
3. New Jersey Act of 1860 95
4. Rivers and Harbors Appropriation Act of 1899, Sections 9 and 10 97

PAGE
5. Bridge Act of 1906 99
6. New Jersey Laws of 1914, Chapter 123..... 104
7. New Jersey Laws of 1915, Chapter 242..... 106
8. Special Act of Congress of August 8, 1919..... 107
9. Special Act of Congress of February 15, 1921.... 108

Table of Cases Cited.

Alabama Power Co. v. Gulf Power Co., 283 Fed., 606.69, 73
Arnold v. Mundy, 6 N. J. L., 1..... 11
Attorney General v. Hudson County Water Company, 76 N. J. Eq., 543 .....24, 78
Barbier v. Connolly, 113 U. S., 27..... 30
Binns v. United States, 194 U. S., 486..... 46
Bridge Company v. United States, 105 U. S., 470....43, 83
California v. Pacific Railroad Co., 127 U. S., 1..... 36
Charles River Bridge v. Warren Bridge, 11 Peters, 420. 11
Chicago Junction Case, 264 U. S., 258.....11, 82
Chicago Transportation Co. v. Pennsylvania Co., 246 Fed., 190 .....22, 50
City of Beaumont v. Texas & New Orleans R. R. Co., 296 Fed., 523 .....22, 52
Cleveland, Painesville & Ashtabula R. R. Co. v. Franklin Canal Co., Fed Cas., 2890 23
Cobb v. Commissioners of Lincoln Park, 202 Ill., 427 .....24, 25, 78
Cooley v. Board of Wardens of the Port of Philadelphia, 12 How., 299 .....59, 60
County of Mobile v. Kimball, 102 U. S., 691..... 57
Cummings v. Chicago, 188 U. S., 410, 15, 20, 32, 33, 34, 43, 54, 55, 58, 81
Dayton-Goose Creek Ry. Co. v. U. S., 263 U. S., 456... 49
Duplex Printing Press Co. v. Deering, 254 U. S., 443.. 45
Economy Light & Power Co. v. United States, 256 Fed., 792; 256 U. S., 113 26
Erie Railroad v. Board of Public Utility Commissioners of N. J., 254 U. S., 394.....17, 19, 63
Escanaba Co. v. Chicago, 107 U. S., 678, 14, 15, 20, 28, 30, 54, 60
Georgia v. Chattanooga, 264 U. S., 472..... 75
Gibson v. United States, 166 U. S., 269..... 71
Gilbert v. Minnesota, 254 U. S., 325..... 55
Gilman v. Philadelphia, 3 Wallace, 713..... 61
Gring v. Ives, 222 U. S., 365..... 34
Hagan v. City of Richmond, 104 Va., 723..... 56
Hammer v. Dagenhart, 247 U. S., 251 .....63, 76, 87
Hardin v. Jordan, 140 U. S., 371..... 30

PAGE
Hoboken v. Pennsylvania Railroad Co., 124 U. S., 656. 18, 19
Hubbard v. Fort, 188 Fed., 987 ..... 25, 52, 78
Hudson County Water Co. v. McCarter, 209 U. S., 349. 65
Hudson River Connecting Case, 228 N. Y., 203; 254 U. S., 631 ..... 52, 53, 54
Huse v. Glover, 119 U. S., 543 ..... 63, 72
Illinois Central R. R. Co. v. Illinois, 146 U. S., 387 11
Illinois Central R. R. Co. v. Public Utilities Commission, 245 U. S., 493 ..... 44, 55, 85
International Bridge Co. v. New York, 223 N. Y., 137; 254 U. S., 126 ..... 12-18, 22, 31, 54, 85
Kansas v. Colorado, 206 U. S., 46 69
Kaw Valley Drainage District v. Missouri Pacific Ry. Co., 99 Kan., 188 52
Kaw Valley Drainage District v. Missouri Pacific Ry. Co., 111 Kan., 183 20
Lake Shore & Michigan Southern Ry. Co. v. Ohio, 165 U. S., 365 ..... 18, 20, 31, 37, 51, 57, 63, 71, 79
Leovy v. United States, 177 U. S., 621 28
License Cases, 5 Howard, 504 31
Logan v. Davis, 233 U. S., 613 21
Lorman v. Benson, 8 Mich., 18 44
Louisville & Nashville R. Co. v. Kentucky, 161 U. S., 677 28
Louisville Bridge Co. v. United States, 242 U. S., 409 ..... 11, 43, 84
McCulloch v. Maryland, 4 Wheaton, 316 82
McPherson v. Blacker, 146 U. S., 1 21
Milwaukee v. Gimbel Bros., 130 Wis., 31 ..... 11, 52
Missouri, Kansas & Texas Ry. Co. v. Haber, 169 U. S., 613 58
Missouri, Kansas & Texas Ry. Co. v. Harris, 234 U. S., 412 55
Mobile County v. Kimball, 102 U. S., 691 57
Monongahela Navigation Co. v. United States, 148 U. S., 312 75
Montgomery v. Portland, 190 U. S., 89 ..... 20, 33, 44, 58
North Shore Boom Co. v. Nicomen Boom Co., 212 U. S., 406 57
Ogden v. Saunders, 12 Wheaton, 213 17
Passenger Cases, 7 Howard, 283 64
Pedrick v. Raleigh & Pamlico Sound R. R. Co., 143 N. C., 485 52
Pennsylvania R. R. Co. v. International Coal Co., 230 U. S., 184 46
People v. Hudson River Connecting Railroad Corporation, 228 N. Y., 203; 254 U. S., 631 ..... 52, 53, 54
People v. Metropolitan West Side Elevated Ry. Co., 285 Ill., 246; 252 U. S., 573 52

PAGE
People v. New York & Staten Island Ferry Co., 68 N. Y., 71 11
People *ex rel.* Murphy v. Kelly, 76 N. Y., 475..... 30
Percy Summer Club v. Astle, 110 Fed., 486..... 11
Pollard's Lessee v. Hagan, 3 Howard, 212.....16, 67
Port of Seattle v. Oregon & Washington R. R. Co., 255 U. S., 56 70
Port Richmond & Bergen Point Ferry Co. v. Hudson County, 234 U. S., 317.....61, 63
Railroad Comm. of California v. Southern Pacific Co., 264 U. S., 331 63
Reid v. Colorado, 187 U. S., 137 55
Savage v. Jones, 225 U. S., 501 55
Scranton v. Wheeler, 179 U. S., 141..... 44
Shively v. Bowlby, 152 U. S., 1..... 68
Stanley v. Schwalby, 147 U. S., 508..... 11
Stone v. Southern Illinois Bridge Co., 206 U. S., 267..52, 71
Sweet v. Rechel, 159 U. S., 380..... 74
Swendig v. Washington Water Power Co., 265 U. S., 322 21
Texas v. Eastern Texas R. R. Co., 258 U. S., 204..... 76
Townsend v. Brown, 24 N. J. L., 80..... 11
Union Bridge Co. v. United States, 204 U. S., 364....44, 49
United States v. Carver, 260 U. S., 482..... 54
United States v. Chandler-Dunbar Water Power Co., 229 U. S., 53 72
United States v. Coca-Cola Co., 241 U. S., 265..... 46
United States v. Cress, 243 U. S., 316..... 76
United States v. Delaware & Hudson Co., 213 U. S., 366 76
United States v. Holt State Bank, 294 Fed., 161..... 70
United States v. Lynah, 188 U. S., 445..... 75
United States v. Midwest Oil Co., 236 U. S., 459..... 21
United States v. Railroad Bridge Co., 6 McLean, 517.. 23
United States v. Rio Grande Irrigation Co., 174 U. S., 690.....28, 38, 69, 72
United States v. St. Paul, M. & M. Ry. Co., 247 U. S., 310 .....45, 46
Van Brocklin v. Tennessee, 117 U. S., 151..... 68
Weber v. Harbor Commissioners, 18 Wallace, 57 68
Westlake Avenue Seattle, In re, 66 Wash., 277..... 49
Whipple v. Martinson, 256 U. S., 41..... 55
Willink v. United States, 240 U. S., 572 72
Willson v. Blackbird Creek Marsh Co., 2 Pet., 245..... 15
Wilmington Transportation Co. v. R. R. Comm. of California, 236 U. S., 151 63
Wilson v. Hudson County Water Co., 76 N. J. Eq., 543 .....24, 78

Other Authorities.

PAGE

U S. Constitution:

Fifth Amendment 75, 76
Tenth Amendment 69, 76

Acts of Congress:

U. S. R. S., §4283 56
5 Stat. (L. & B. Ed.), 283 23
18 Stat., 275 ..... 13, 22
21 Stat., 180 35
23 Stat., 133 35
25 Stat., 400 36
26 Stat., 426 ..... 31, 36, 51
26 Stat., 1044 58
27 Stat., 88 38
30 Stat., 1121 ..... 32, 39, 52, 97
32 Stat., 374 19
34 Stat., 84 (Bridge Act of 1906), 1, 3, 27, 41, 43, 48, 49, 50, 59, 65, 80, 99
35 Stat., 815 73
38 Stat., 308 53
39 Stat., 675 76
41 Stat., 277 ..... 3, 10, 12, 45, 48, 77, 81, 107
41 Stat., 456 (Transportation Act, 1920) 49, 56
41 Stat., 1063 ..... 69, 73
41 Stat., 1099 ..... 3, 10, 12, 45, 48, 77, 79, 81, 108
42 Stat., 174 ..... 4, 81, 82, 83, 84
42 Stat., 822 ..... 4, 81
New Jersey L. 1860, c. 64 ..... 2, 95
New Jersey L. 1905, c. 238 65
New Jersey L. 1914, c. 123 ..... 3, 104
New Jersey L. 1915, c. 242 ..... 4, 106
New Jersey L. 1921, c. 151 4
New Jersey L. 1922, c. 9 9
New York L. 1857, c. 753 12
New York L. 1869, c. 550 12
New York L. 1913, c. 388 53
New York L. 1915, c. 666 13
New York L. 1921, c. 154 4
New York L. 1922, c. 43 4

Congressional Record:

40 Cong. Rec., 309 46
40 Cong. Rec., 1717 ..... 47, 85, 86, 92
62 Cong. Rec., 7976 82

Opinions of the Attorneys General, Vol. 8, p. 8 23
Opinion of Judge-Advocate General 20, 68, 86
Report H. R. No. 182, 59th Congress, First Session .. 46, 89
Warren's The Supreme Court in United States History, Vol. III, p. 353 64

IN THE

Supreme Court of the United States

THE CITY OF NEWARK, THE CITY OF JERSEY CITY and THE STATE OF NEW JERSEY,
Appellants,
against
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY,
Appellees.

October Term, 1924
No. 351

APPELLANTS' BRIEF.

Statement.

This is an appeal from a final decree of the United States Circuit Court of Appeals for the Third Circuit* (Rec., p. 110) affirming the dismissal for want of equity of a bill (Rec., pp. 8-27) brought by the City of Newark—the prayer of the bill being joined in by certain intervening complainants, the State of New Jersey and the City of Jersey City (Rec., pp. 74 *et seq.* and 82 *et seq.*)—to enjoin the construction of a proposed bridge across Newark Bay, a navigable estuary *wholly within the State of New Jersey*, the State's assent to the bridge not having been secured. The complainant specially set up and claimed a threatened violation of its constitutional rights. Other grounds of federal jurisdiction are found in the provisions of the Act of Congress of March 23, 1906, Section 5 (34 Stat., 84, 86; printed in the Appendix, *post*, p. 102).

*Opinion reported in 297 Fed., 77.

The motion for a preliminary injunction was made on the bill of complaint and five supporting affidavits (Rec., pp. 27-48).

The Bill of Complaint alleges (Rec., p. 9) that complainant, the City of Newark, is the owner of a large tract of land on the west shore of Newark Bay. Upon this land it has, by the authority of State statutes (Rec., p. 10), developed a large terminal, known as the Port Newark Terminal, upon which it has expended about $6,500,000 (Rec., p. 10). The nature and scope of the development are fully described in the affidavit of Thomas L. Raymond in support of the motion for a preliminary injunction (Rec., pp. 42-48). Attached to his affidavit is a map (Exhibit A; Rec., p. 49) showing the location of Port Newark Terminal on Newark Bay, and an aerial photograph (Exhibit B; Rec., p. 51) showing the terminal and its general relation to New York Harbor.

The defendant railroad now reaches New York Bay by two different routes from Elizabeth, New Jersey. One of these routes is a line running north along the west shore of Newark Bay and crossing the mouths of the Passaic and Hackensack Rivers by bridges to Communipaw (Complaint, Rec., pp. 21-22); Staniford, Rec., p. 30). The other line runs from Elizabeth, New Jersey, by a bridge across Newark Bay to Bayonne, New Jersey, and thence north through Bayonne to Communipaw. The threatened supplanting of this bridge by a new one of a wholly different design, without the permission of the State, is the act which the complainant seeks to enjoin. The bridge by which the latter line crosses Newark Bay was constructed by the railroad pursuant to an Act of the New Jersey Legislature approved February 23, 1860 (Pamph. L., 1860, c. 64). This Act, which is reprinted in the Appendix, *post*, pp. 95 and 96, authorized the construction of a bridge "with a pivot draw with two openings, each of seventy-five feet in width, at right angles to the main channel."

The present Newark Bay bridge of the defendant railroad is a double-track wooden bridge with bascule draws, built at an angle of 66° to the main channel (Rec., pp. 10-11).

For some years past the defendant railroad has been seeking authority to construct a substitute bridge of masonry and steel, with four tracks and vertical draws, upon substantially the same location as the present bridge (Rec., p. 11). In its efforts to secure this authority, the railroad company procured the passage of an Act of Congress, approved August 8, 1919 (41 Stat., 277), and of a further Act approved February 15, 1921 (41 Stat., 1099), which Acts purported to grant federal sanction to the construction, maintenance and operation by the defendant railroad of a bridge and approaches thereto across Newark Bay at a point suitable to the interests of navigation between Elizabeth, New Jersey, and Bayonne, New Jersey (Rec., pp. 11-12), in accordance with the provisions of the Bridge Act of 1906 (34 Stat., 84). These statutes are printed in full in the Appendix, *post*, pp. 107 and 108.

The Railroad's unsuccessful attempts to secure the State's consent to the proposed bridge.

By an Act of the New Jersey Legislature approved April 8, 1914 (Pamph. L., 1914, c. 123; Appendix, *post*, pp. 104-105), the New Jersey Harbor Commission had been created and it had been provided in Section 4 of this act, among other things, that all plans involving the construction, change, alteration or modification of any bridge should be first submitted to the Commission, and that no such work should be commenced or executed without the Commission's approval. This Act also declared any work so commenced without such approval to be a purpresture and a public nuisance. By an Act of

the New Jersey Legislature, approved April 8, 1915 (Pamph. L., 1915, c. 242; Appendix, *post*, p. 106), the duties of the New Jersey Harbor Commission were devolved upon the Board of Commerce and Navigation.

Defendant-appellee, The Central Railroad Company of New Jersey, both before and after the passage of the acts of Congress of 1919 and 1921, applied, pursuant to the New Jersey laws, to the Board of Commerce and Navigation and submitted to it the plans of its proposed new bridge for approval. These applications were made on February 16, 1917, June 12, 1918, and February 2, 1922. All of these applications were denied, and the proposed new bridge has not the approval of the Board of Commerce and Navigation of the State of New Jersey (Complaint, Rec., pp. 15-16; Gelineau, Rec., pp. 41-42), nor of any other body acting for the State.

The Port of New York Authority.

The defendant, The Port of New York Authority, was created as a result of a compact between the States of New York and New Jersey, authorized by Chapter 154 of the New York Laws of 1921 and Chapter 151 of the New Jersey Laws of 1921. This body consists of six Commissioners, three of whom are chosen by each of the States. The compact was ratified by a joint resolution of Congress approved August 23, 1921 (42 Stat., 174). The compact provided that the Port Authority should, as soon thereafter as possible, adopt a comprehensive plan for the development of the Port of New York. This plan was thereafter agreed upon and approved by the States by Chapter 43 of the New York Laws of 1922 and Chapter 9 of the New Jersey Laws of 1922. By a joint resolution of Congress, approved July 1, 1922 (42 Stat., 822) the authority was granted by Congress to the Port Authority to carry out and

effectuate the comprehensive plan. The plan provided for the construction of various tunnels, bridges and belt-lines (Rec., pp. 16-18).

The proposed bridge of The Central Railroad Company of New Jersey is not shown on the plan authorized to be effectuated by the Resolution of Congress, and is alleged in the bill (Rec., p. 20), and admitted by the motion to dismiss, to be *"in conflict therewith, obstructive thereof and inimical thereto."* The Port Authority has not authorized the proposed bridge and has excluded it from the comprehensive plan for the reason, as alleged in the bill (Rec., p. 21), that such a bridge would constitute an obstacle to the proper development of the Port of New York. See in this connection the answer of the defendant-appellee, The Port of New York Authority, (Rec., p. 57).

The bill further alleges that the construction of the proposed new bridge would be, under the laws of the State of New Jersey, an unlawful purpresture, and further that it would constitute an insuperable obstacle to the proper carrying out of the comprehensive plan for the development of the New York Port District, thereby contravening the purposes of the joint resolution of Congress (Rec., p. 22).

Damaging consequences of a bridge at the point proposed.

The bill further alleges that the construction of the bridge would seriously interfere with the development of the Port Newark Terminal, upon the further development of which is dependent the receipt by the complainant of any adequate return upon its investment, and that the complainant has been unable to secure tenants for its properties at Port Newark Terminal because of the threatened construction of the proposed

bridge (Rec., p. 23). The difficulties which would be imposed upon navigation by the construction of the proposed bridge are described in the affidavits of Henry R. Lewis and F. J. Stillwaggon (Rec., pp. 33-40) in support of the motion. A drawbridge at the point in question makes necessary the use of tugs at large expense (Rec., p. 35), and even under the most favorable circumstances the entry into Newark Bay through any bridge at its mouth is hazardous. The proposed bridge, the fixed portions of which are to have a clearance of 35 feet, will have to be opened for all steam lighters and practically all barges (Stillwaggon, Rec., pp. 39-40), and for seventy-five per cent. of the lighters now operated in connection with the vessels of the Transmarine Corporation, a tenant of Port Newark Terminal (Lewis, Rec., p. 37). The present bridge is equipped with a type of draw which when opened imposes no limit upon the height of vessels passing through it (Stillwaggon, Rec., p. 38). The proposed bridge which is to have a vertical lift draw with a clearance of 135 feet when opened, will permanently exclude all vessels the height of whose masts exceed 135 feet. Many of the ocean-going cargo vessels entering New York Bay are of such a type (Stillwaggon, Rec., p. 39).

The bill also alleges that on December 29, 1922—after the New Jersey Board of Commerce and Navigation had refused to authorize the bridge—the Secretary of War and the Chief of Engineers approved the plans of the Railroad Company for a new bridge at the point in question, but that such action was arbitrary and void, and that the acts upon which the Secretary of War and the Chief of Engineers purported to rely violate complainant's rights under the Fifth Amendment of the Constitution of the United States and are in violation of the Tenth Amendment (Rec., p. 23).

It is alleged that if any bridge is constructed between the cities of Bayonne and Elizabeth, the free and unobstructed access of river and ocean-going vessels to Port Newark Terminal will be prevented, and the value of its terminal to complainant destroyed (Rec., p. 24).

The bill further alleges (Rec., p. 24) that the construction of the new bridge has already commenced and that the complainant will suffer irreparable injury if it is continued.

The alternatives available to the Central Railroad Company of New Jersey are set forth in detail in the affidavit of Charles W. Staniford (Rec., pp. 30-32). They are, broadly speaking, a re-routing of the railroad over its present line across the Passaic and Hackensack Rivers, or a tunnel at the site of the proposed new bridge.

The prayer of the bill is that the Court adjudge that the complainant is by reason of its direct pecuniary interest entitled to maintain this suit; that The Central Railroad Company of New Jersey is without right or power to construct the proposed new bridge, and that the construction would constitute an unlawful purpresture and a public nuisance; that the Acts of Congress of August 8, 1919, and February 15, 1921, are unconstitutional; that the construction of the new bridge without the permission of The Port of New York Authority and/or the Board of Commerce and Navigation is unlawful, and that the Court grant temporary and permanent injunctions (Rec., pp. 25-26).

The Intervenors.

The State of New Jersey, prior to the hearing before the District Court, filed its petition for leave to intervene (Rec., pp. 74-79) and prayed for the same injunctive relief as that prayed for in the complaint. An order grant-

ing leave to intervene was duly made (Rec., p. 80). The State joined in the complainant's motion for a preliminary injunction, and the State's motion, as well as the complainant's, was denied by the District Court, whose final decree was affirmed by the Circuit Court of Appeals (Rec., p. 110). The State joined the complainant in praying an appeal to this Court, which was granted (Rec,. p. 111).

The City of Jersey City, intervenor, followed precisely the same course as the State of New Jersey.

Assignments of Error.

The appellants, while maintaining in their assignments of error that the Court below erred in holding that the motion of the complainants for injunctive relief was properly denied, in holding that the defendant railroad was authorized to proceed with the erection of the proposed bridge without the approval either of the State Board of Commerce and Navigation or of the Port of New York Authority, in holding that no *prima facie* case had been presented and in holding that the bill was properly dismissed, principally rely on the fourth and fifth assignments of error, which read as follows:

> "4. The court erred in holding that the Congress of the United States had power under the Constitution to authorize the construction of the bridge described in the bill of complaint without the approval thereof by the State of New Jersey or by the State Board of Commerce and Navigation of the State of New Jersey, and/or by the Port of New York Authority.
>
> "5. The court erred in so construing the Act of Congress, approved March 23, 1906, and known as the Bridge Act of 1906, as to make the authorization of said Act sufficient for the construction of a bridge over navigable waters wholly within one State, and to render the authorization thereof by such State unnecessary" (Rec., p. 112).

And in addition to the foregoing, the *ratio decidendi* of the Circuit Court of Appeals has made necessary the following assignments of error:

> "6. The court erred in holding that there had been an exercise of the power of eminent domain by the United States in connection with the bridge described in the Bill of Complaint.
>
> "7. The court erred in refusing to hold that the concurrent assent of both the State and the Federal Government is necessary before a bridge over navigable waters wholly within one State may be lawfully erected.
>
> "8. The court erred in refusing to hold that the source of power to construct a bridge over navigable waters wholly within the confines of one State is in the State itself" (Rec., p. 112).

The Issues In This Court.

The appellee Railroad relies upon the Special Acts of Congress passed in 1919 and 1921 (Appendix, *post*, pp. 107 and 108) for its authority to build the bridge and contends that by these acts and by the Bridge Act of 1906, to which they refer, the Congress exercised its plenary power over interstate commerce and granted the Railroad full authority, free from state control, thus overriding the disapproval of the bridge by the duly constituted authorities of the State of New Jersey. The appellants contend that these Special Acts and the Bridge Act merely granted the consent of the United States in the exercise of its concurrent power to regulate navigation, without interfering with the reserved powers of the State of New Jersey over waters wholly within its boundaries.

The Circuit Court of Appeals said in its opinion (Rec., p. 108):

> "The complainants contend that these Amendments require that the concurrent consent of both

> State and Federal Government be obtained before a bridge over navigable waters wholly within one State may be lawfully constructed. Disregarding at present the contention of the respondent that the waters in question are not wholly within the State of New Jersey, is the proposition sound? The decision of this case depends upon the answer to this question. The State of New Jersey refused to give its consent and if that consent is necessary before the bridge may be lawfully built the will of the State, and not that of the Federal Government, is supreme."

The foregoing excerpt from the opinion does not, however, show proper appreciation of the appellants' alternate contention that, leaving the constitutional question to one side, the Congress, in passing the Bridge Act of 1906 (34 Stat., 84) and the Special Acts (41 Stat., 277 and 1099), had no intention to dispense with State assent to bridges in cases where the proposed bridge was over navigable waters wholly within one State.

The contention of the appellants, briefly stated, therefore, is that the Special Acts of 1919 and 1921, and the Bridge Act of 1906 to which they refer must be held unconstitutional and void and not a justification for the threatened conduct of the defendant railroad, or must be construed to make State assent to the bridge as indispensable to its legality as the federal, so that the conduct of the defendant remains unlawful until such State assent is secured.

The Circuit Court of Appeals in its opinion properly rejected the view of the District Court (Rec., p. 93) that the consent to a bridge at the point in question given by the State in 1860 "expands" to embrace the replacement of the original bridge by one whose interference with

navigation is far more serious than that caused by the original bridge.* Furthermore, the allegations in the bill (Rec., p. 16) that the proposed bridge has not received the State's consent are allegations of fact which are admitted by the motion to dismiss. *Chicago Junction Case*, 264 U. S., 258, 262-263 (1924).

The appeal brings up before this Court the right of the State of New Jersey to injunctive relief, and not merely the right of the original complainant. For the District Court was unquestionably empowered to permit the State's intervention, and any other action would have been error. "It would be especially unbecoming," said PUTNAM, Circuit Judge, in *Percy Summer Club* v. *Astle*, 110 Fed., 486, 488 (C. C. A., 1st Circ., 1901), "for the federal courts to pass on a great question in which a sovereign state of the Union has a direct interest, if not as lord paramount, at least as representing all its citizens, without affording it an opportunity to be heard before the legal proceedings in which the question is involved are concluded." Intervention by the State of New Jersey having occurred, it was the duty of the Courts below, and in so far as that duty remains unfulfilled it is the duty of this Court on appeal, to "adjust its judgment according to the rights disclosed on the part of the government thus intervening." *Stanley* v. *Schwalby*, 147 U. S., 508, 513 (1893).

*This holding of the District Court was plainly incapable of reconciliation with such decisions in this Court as *Illinois Central R. R.* v. *Illinois*, 146 U. S., 387, 453, 460 (1892) and *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 420, 547-553 (1837). See also *Arnold* v. *Mundy*, 6 N. J. L., 1, 78 (1821); *Townsend* v. *Brown*, 24 N. J. L., 80, 87 (1853); *People* v. *New York & Staten Island Ferry Co.*, 68 N. Y., 71, 76-77 (1877); *Milwaukee* v. *Gimbel Bros.*, 130 Wis., 31, 36 (1906); *Louisville Bridge Co.* v. *United States*, 242 U. S., 409, 417 (1917).

POINT I.

The source of power to construct a bridge over navigable waters wholly within the confines of one State is in the State itself. The federal regulations are permissive only.

This point is the basis of the eighth assignment of error, and is a principle of such fundamental importance that we believe its restatement at the threshold is essential before we enter upon a detailed discussion of the intent of Congress in passing the Bridge Act of 1906, upon which rest the Special Acts of 1919 and 1921.

1. The *International Bridge* case.

Probably the latest pronouncement by this Court in a case involving the power and continuing control of a State over a bridge erected according to plans approved by the Secretary of War, is the case of *International Bridge Co.* v. *New York,* 254 U. S., 126 (1920). This was an action by the State of New York to recover penalties incurred by the failure of the defendant to construct a roadway for vehicles and a pathway for pedestrians on its bridge over the Niagara River between New York and Canada. The International Bridge Company was incorporated by a special act (N. Y. Laws 1857, c. 753) for the purpose of constructing a bridge at the site in question. A Canadian corporation was also formed under the Canadian laws; and by an act of the State of New York (N. Y. Laws 1869, c. 550), the two corporations were consolidated, provision being made in the statute that the bridge was to be as well for the passage of persons on foot and in carriages as for the passage of trains. The act of Congress thereafter passed approved the plans for the bridge as set

forth in the State statute. Upon its completion the bridge received the affirmative approval of Congress and was "hereby declared to be a lawful structure, and an established post route for the mail of the United States" (18 Stat., 275).

In 1899 the bridge was rebuilt without roadways and footpaths, pursuant to plans approved by the Secretary of War, but not by the State authorities. The rebuilding was completed in the year 1901. In 1907 the Secretary of War gave notice to the company that the bridge obstructed navigation and required changes. The bridge was again reconstructed under the direction of the Secretary of War, without roadways and footpaths. The consent of the State authorities was, on this occasion also, neither sought nor obtained.

Thereafter in 1915 the State of New York awoke from its apathy and passed a statute (N. Y. Laws 1915, c. 666) which provided that the Bridge Company should proceed to equip its bridge with a roadway for vehicles and a pathway for pedestrians by January 1, 1916, and provided that the company should be fined $50 a day for each day it remained in default. The company failed to comply with the statute, and a suit was instituted for the penalties in the name of the People of the State of New York. The company averred that the statute of 1915 was unconstitutional because all State control over the bridge had ceased upon the action of the federal authorities in 1899 and in 1907. The People recovered a judgment, which the highest court of the State affirmed (223 N. Y., 137). This Court, to which the case was taken on writ of error, affirmed the decision of the New York Court of Appeals. As to the nature of the congressional power in the premises, the Court of Appeals had said (p. 145):

> "It [the federal government] could give its consent to the construction of a bridge upon such terms as it saw fit and even after the bridge

was built, if it interfered with commerce, could withdraw its consent and compel its removal. It did consent that the defendant construct piers for the bridge on property of the state, and the bridge, with the consent of the state, was built on such property. No way was provided for pedestrians or vehicles. It was built primarily for interstate and foreign commerce, but this did not give the United States any other or greater supervision over it than it otherwise had. It could simply regulate its use for interstate and foreign commerce. This did not subject the defendant to the control of the United States government in any other respect. It still remained a New York corporation which state had the power to regulate within its limits matters of internal police, including in that general designation 'whatever would promote the peace, comfort, convenience and prosperity of its people.'* This power included among other things the construction of bridges within its territory."

This Court, affirming, said, *per* Mr. Justice HOLMES (p. 132):

"The part of the structure with which we are concerned is within the territorial jurisdiction of the State of New York. There was no exercise of the power of eminent domain by the United States. The State was the source of every title to that land and, apart from the special purposes to which it might be destined, of every right to use it. Any structure upon it considered merely as a structure is erected by the authority of New York. The nature and qualifications of ownership are decided by the State, and although certain supervening uses consistent with those qualifications cannot be interfered with by the State, still the foundation of a right to use the land at all must be laid by State law. Not only the existence of the Company but its right to build upon New York land came from New York, as was

*This definition is, with slight verbal changes, taken by the Court of Appeals from *Escanaba Co.* v. *Chicago*, 107 U. S., 678, 683 (1882).

> recognized by the form of the original Act of Congress of 1870, which speaks of any bridge built 'in pursuance of' the New York statutes. It did not, as perhaps the New York Consolidation Act did, refer to those statutes simply as documents and incorporate them, it referred to them as the source of the Company's power."

The Court then took up the cases of *Escanaba Company* v. *Chicago*, 107 U. S., 678 (1883) *post*, p. 60, and *Cummings* v. *Chicago*, 188 U. S., 410 (1903), *post*, pp. 32-33, saying (pp. 132-133):

> "From an early date the State has been recognized as the source of authority in the absence of action by Congress. Willson v. Blackbird Creek Marsh Co., 2 Pet., 245; Escanaba Co. v. Chicago, 107 U. S., 678. *And this Court has been slow to interpret such action as intended to exclude the source of rights from all power in the premises.* In a case of navigable waters wholly within a State, over which a right of way had been conveyed to the United States and which the United States was spending considerable sums to improve, it was held that, whether or not Congress had power to authorize private persons to build in such waters without the consent of the State, an act making comprehensive regulations of work within them did not manifest a purpose to exclude the previously existing authority of the State over such works. Cummings v. Chicago, 188 U. S., 410, 413, 428, *et seq.*"

The Court referred to the Bridge Act of 1899 and said by way of conclusion (p. 133):

> "The act does not make Congress the source of the right to build but assumes that the right comes from another source, that is, the State. It merely subjects the right supposed to have been obtained from there to the further condition of getting from Congress consent to action upon the grant."

We feel constrained to express our amazement at the method by which the Circuit Court of Appeals distinguished the *International Bridge* case. The Court said (Rec., p. 109):

> "But in that case, the United States had not exercised the power of eminent domain."

If the implication from this language is that the United States *did* exercise the power of eminent domain in the case at bar, the Court has fallen into a double error: for (1) the record is absolutely devoid of anything that could by any possible construction be cited to support such a finding, and (2) even if the United States had attempted to exercise the power of eminent domain over the lands under water in question, the attempt would have been void under settled principles of law. See *Pollard's Lessee* v. *Hagan*, 3 Howard, 212 (1844), holding a patent from the Federal government to lands under water in Alabama insufficient to support an action of ejectment. The Court said (p. 230):

> "This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the States within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the States of the power to exercise a numerous and important class of police powers."

And see Point V, sub-point 1, *post*, page 65, and sub-point 3, *post*, page 74.

To say, as did the Courts below in the case at bar, that Congress has, in approving the Newark Bay Bridge, completely covered the field to the necessary exclusion

of all State authority in the same field, is to extend beyond its true limits the action which Congress takes when it approves a bridge. *When Congress consents to the erection of a bridge, it acts on an existing situation a necessary incident of which is a vital State law.* We may leave to one side the exceptional cases where Congress has created a federal corporation to construct an interstate bridge. In the ordinary case, what comes first is a grant by the State of power, which grant may take the form of a statute enlarging the corporate capacity* of the corporation which is to build the bridge; Congress, this Court said in *International Bridge Co.* v. *New York, supra,* "assumes that the right comes from another source, that is, the State." And see *Erie Railroad* v. *Board of Public Utility Commissioners of N. J.,* 254 U. S., 394, 411 (1921), *post,* p. 19. The State law embodying the grant of power is not nullified by the later federal grant; on the contrary, its continuing vitality is necessary to the successful outcome of the transaction. For only a grantee having power to receive and act on the grant could avail of it. The capacity to take must not be confused with the making of the conveyance. The capacity to take the grant comes from State law; the conveyance itself is an act of federal law. The co-operation of both laws is an indispensable element. To take an analogy: just as the contracts clause of the Constitution

> "presupposes the existence of contracts by the act of the parties, and the existence of their obligation, not by authority of the constitution, but by authority of [state] law" (*Ogden* v. *Saunders,* 12 Wheaton, 213, 326 [1827]),

so also do the Acts of Congress in the instant case—as in the *International Bridge* case, *supra*—presuppose the

*We need only turn to page 11 of the record before us for a precedent where the Act in which the State has authorized a bridge has been in form an amendment to the corporate charter of the corporation which is to build the bridge.

existence of a State law conferring power to build the bridge; and this State law continues to possess efficacy and must still be looked to as the indication of the limits of that power after the issuance by the Secretary of War of a permit under the Bridge Act of 1906.

In *Lake Shore & Michigan Southern Ry. Co.* v. *Ohio*, 165 U. S., 365, 368 (1897), this Court said:

> "The mere delegation to the Secretary [of War] of the right to determine whether a structure authorized by law has been so built as to impede commerce, and to direct, when reasonably necessary, its modification so as to remove such impediment, does not confer upon that officer power to give original authority to build bridges, nor does it presuppose that Congress conceived that it was lodging in the Secretary power to that end."

To say that the congressional manifestation of consent nullifies the State law is to say that after we have built the roof of the house we can dispense with the foundations.

The assumption by Congress that the power to build the bridge which was the subject matter of the decision in *International Bridge Company* v. *New York, supra*, comes from the State, is an assumption which must of necessity be made in the case of a bridge to be erected over tidal waters within the State of New Jersey. In fact, we pass beyond assumptions in this case into the realm of established facts and well-settled rules of law. In *Hoboken* v. *Pennsylvania Railroad Co.*, 124 U. S. 656 (1888), Mr. Justice MATTHEWS said (p. 688):

> "In the examination of the effect to be given to the riparian laws of the State of New Jersey by the act of April 11, 1864, in connection with the supplementary act of March 31, 1869, it is to be borne in mind that the lands below high-water mark, constituting the shores and submerged

> lands of the navigable waters of the State, were, according to its laws, the property of the State as sovereign. Over these lands it had absolute and exclusive dominion, including the right to appropriate them to such uses as might best serve its views of the public interest, subject to the power conferred by the Constitution upon Congress to regulate foreign and interstate commerce."

This doctrine of the necessity of looking to the State as the primary source of power is reflected in the case of *Erie Railroad Company* v. *Board of Public Utility Commissioners of New Jersey*, 254 U. S., 394 (1921), where this Court upheld the State's power to abolish grade crossings on a railroad used in interstate commerce, saying, *per* Mr. Justice HOLMES (p. 411):

> "To engage in interstate commerce the railroad must get on to the land and to get on it must comply with the conditions imposed by the State for the safety of its own citizens."

Application to the State for permission to enter upon lands is all the more necessary where, as here, the lands are lands under a navigable body of water and hence are owned by the State in its sovereign capacity. *Hoboken* v. *Pennsylvania Railroad Company, supra;* and see the authorities discussed in Point V, sub-point 1 of this brief.*

The congressional power referred to in the *Hoboken* case is, as will be more fully demonstrated in Points II and III, a power to abolish obstructions licensed by the State, and not a power to place erections on State

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*Congress seems always to have been aware that the approval of a bridge by the War Department, and a permit to enter upon lands in order to erect piers, etc., for the bridge, are separate and distinct things, and that the War Department's approval is not such a plenary authorization as to include the latter right. See 32 Stat., 374, where Congress, in extending the provisions of the 1899 Act to the Illinois and Mississippi Canal, added a special proviso to the effect that the Secretary of War, in approving plans for bridges over the Canal, might grant to the builder of the bridge the right to place piers, etc., on Government lands along the Canal.

land without the State's assent. The necessary federal paramountcy may be established by a holding to the effect that even though a bridge has State sanction, that is not enough to prevent its abolition if it contravenes federal standards as to what obstructs navigation.

2. The War Department's own view concerning the present state of the law, as evidenced by an opinion of the Judge-Advocate General given in 1922.

In *Kaw Valley Drainage District* v. *Missouri Pacific Ry. Co.*, 111 Kansas, 183, 207 Pac., 218 (1922), the Court refused to enjoin the reconstruction of a certain bridge on plans approved both by the State and by the War Department. The Court viewed the plaintiff's conduct as captious, and quoted in full as an Appendix to its opinion a "Memorandum for the Secretary of War" wherein was set forth the advice the Secretary acted on in issuing, over the protests of this plaintiff, his approval of the bridge plans in question. The Memorandum is dated February 18, 1922, and is signed by J. A. HULL, Acting Judge-Advocate General, and by J. M. WAINWRIGHT, Assistant Secretary of War. After citing and commenting on *Cummings* v. *Chicago, Lake Shore & M. S. Ry. Co.* v. *Ohio, Escanaba Company* v. *Chicago, Montgomery* v. *Portland,* and other cases (all of which are dealt with at length in Point II, sub-point 2, *infra*), the memorandum continues (p. 192):

> "This comment seems necessary because of the great weight which complainants attach to the instrument whose revocation they seek and which is referred to in several places in their brief as a 'permit.' *The fact is that without the requisite state authority it is ineffectual.* It is true that it is not the practice of the War Department to

> issue instruments of approval in cases of this nature unless there is a showing of state authority for the work, and such a showing appears in the present case; *but the action of the War Department has, of course, no binding effect upon the state,* whose power in the matter is plenary and will not be interfered with by the federal government unless it come in conflict with the power vested in the federal government with respect to the protection, preservation and improvement of navigation." (Italics ours.)

The Judge-Advocate General's opinion, we submit, cannot be lightly disregarded. It evidences a "contemporaneous and long continued previous practice" which should "be treated as decisive." *McPherson* v. *Blacker,* 146 U. S., 1, 36 (1892). And see the more elaborate discussion of the cogent effect of executive construction in *United States* v. *Midwest Oil Co.,* 236 U. S., 459, 472-473 (1915), where the Court said:

> "It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, lawmakers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation."

And see to the same effect *Logan* v. *Davis,* 233 U. S., 613, 627 (1914); *Swendig* v. *Washington Water Power Co.,* 265 U. S., 322, 331 (1924).

The Phrase "Lawful Structure."

We shall take up the Bridge Act of 1906 in detail in Point II. Section 2 of the Act, however, merits comment at this point. The section provides:

> "That any bridge built in accordance with the provisions of this Act shall be a lawful structure and shall be recognized and known as a post route, * * * ."

We submit that the Judge-Advocate General's Memorandum above referred to, taken in connection with the *International Bridge* case, persuasively shows that in using the words "lawful structure," Congress was speaking for the federal government alone, and was assuming that the expectant bridge builder would apply for his State license first; hence the words "shall be a lawful structure" were used to designate bridges whose builders had completed, or would in due time complete, the requisite preliminaries. Cf. *Chicago Transportation Co.* v. *Pennsylvania Co.*, 246 Fed., 190 (N. Dist. Ill., 1917), *post*, pp. 50-51, and *City of Beaumont* v. *Texas & New Orleans R. Co.*, 296 Fed., 523, 526 (E. Dist. Tex., 1924), *post*, p. 52n.

The reason why the *International Bridge Company* case, *supra*, directly supports this reasoning is that in that case this Court had before it an Act (18 Stat., 275) in which Congress said that the bridge as built in 1874 should "be a lawful structure," and yet this Court held that there was no sufficient covering of the field by federal law to effect the nullification of a State statute imposing conditions on the manner in which the bridge should be built. Furthermore, the bridge there before the Court was an international bridge, whereas the bridge in the case at bar is one wholly within the confines of one State.

The conclusion is supported further by the case of *Cleveland, Painesville & Ashtabula R. R. Co.* v. *Franklin Canal Co.*, Fed. Cas., 2890 (Circuit Court, W. D. Pa., 1853). Here the Court said:

> "The act of Congress [5 Stat. (L. & B. Ed.) 283] making all railroads post roads, means only such as have charters from the several states; it is not to be inferred that they intended to do anything in derogation of the sovereignty of a state, by declaring that to be a post road which was the work of an individual or of a company for his or their profit without law, or it may be in opposition to law."

And see *United States* v. *Railroad Bridge Co.*, 6 McLean, 517, 522-523, Fed. Cas., 16114 (Circuit Court, N. D. Ill., 1855).

In 8 Op. Attys.-Gen., 8, 11 (1856), there is reported an opinion of Hon. Caleb Cushing on the President's duty to extend federal aid upon the occasion of insurrections in any State. During the course of this opinion he observed:

> "As to the clause of the Constitution which makes it the duty of the President 'to take care that the laws be faithfully executed,' that, it is apprehended, refers primarily to the laws of the United States, and to those of a State or Territory only in the contingency when the case of insurrection therein is presented according to the Constitution and to acts of Congress."

To assume, as argued, that "lawful structure" refers to a bridge concurrently authorized by State and Federal Governments, will avoid precipitating grave constitutional questions (as we shall demonstrate in Point V, *infra*), and will exculpate Congress of the charge of having effected a revolutionary change without having had the courage to effect it openly.

3. The doctrine that the federal regulations are permissive only has been enunciated in a number of judicial decisions.

In *Cobb* v. *Commissioners of Lincoln Park,* 202 Ill., 427 (1903), the appellant had leave from the Secretary of War to erect a wharf in navigable waters wholly within the State of Illinois, and sought to enjoin interference by city officials, but the Court said:

> "* * * we are of the opinion that the act prohibiting the erection of wharves without the consent of the Secretary of War is a mere regulation for the benefit of commerce and navigation, and that the license or permission of the Secretary of War is only a finding and declaration of such officer that such proposed structure would not interfere with or be detrimental to navigation, and not that it is equivalent to a positive declaration by the authority of Congress that the licensee may build the wharf or other structure without first obtaining the consent of the owner of the submerged land on which it is his purpose to build. Appellant not having, by the law of this State, the right to construct a wharf over his neighbor's submerged lands without his neighbor's consent, could not acquire that right, without his neighbor's consent, by obtaining a license from the Secretary of War" (pp. 438, 439).

In the case of *Attorney-General* v. *Hudson County Water Company,* 76 N. J. Eq., 543 (1909), the authority granted by the Secretary of War was described as:

> "* * * a mere license from a supervisory power—a license to do the thing desired, efficacious only if and when lawful authority to prosecute the work shall have been obtained" (p. 559).

The Court (WALKER, V.-C.) went on to say (*ibid.*):

> "In this connection it may be observed that the tenth section of the River and Harbor act does not provide that it shall be lawful for the Secretary of War to authorize the excavation of land in the channel of any navigable waters of the United States, but only that it shall not be lawful to do the work without the authorization of the secretary, had before beginning the work. The section as worded clearly contemplates that the consent of the secretary shall merely be permissive of the doing of work for which authority already exists."

In *Hubbard* v. *Fort*, 188 Fed., 987 (Circuit Ct., Dist. N. J., 1911), the complainants were receivers of the Hudson County Water Company, and sought to have certain State officers enjoined from interfering with the construction of a water main under the Kill van Kull from Bayonne, N. J., to Staten Island, N. Y. A permit from the Secretary of War was set forth in the complaint. The pipes were to be used for the "interstate carriage and transfer of subterranean water" (p. 991). No State authorization had been secured. Defendant demurred. Judge RELLSTAB sustained the demurrer.

After citing and quoting from both *Cobb* v. *Commissioners of Lincoln Park*, and *Attorney-General* v. *Hudson County Water Co.*, Judge RELLSTAB said (p. 994):

> "* * * In the New Jersey case will be found a critical review of the authorities relied upon by the complainants in this case. The complainants contend that such case does not give due effect to the cited authorities; but I have carefully considered such authorities, and I concur with the conclusion reached by V. C. Walker that they do not support the contention of complainants' counsel that a license obtained by the Water Company from the Secretary of War is plenary in its character."

Of course, here the complainants had merely a license from the Secretary of War and their project had no special Congressional sanction. But this does not impair the force of this case as an authority. For the Court recognized the distinction between structures across waters which are boundaries, and structures across waters the navigable portions of which are wholly within the limits of a single State. At page 992, Judge RELLSTAB said:

> "No such permit is necessary, however, if authority has been obtained from the United States Congress to make such crossing. It is well-settled law that state authority is not necessary to cross a navigable stream **between states** with instrumentalities engaged in interstate commerce; that such crossing may be made by authority of the Congress in spite of the State's protest."

The foregoing qualified language of the Judge's major premise must be borne in mind in reading his conclusion (p. 999):

> "This is not a case of the United States government seeking to make a crossing of this interstate stream in the exercise of its governmental powers, but an attempt to override a sovereign state's opposition to the use of its submerged land by a corporation of its own creation, under the claim of being engaged in interstate commerce. This can only be successfully accomplished when it shall be shown that Congress in the assertion of its superior rights under the interstate commerce clause of the United States Constitution has clearly and definitely authorized such crossing [*i. e.*, from one State to another]. Until then the State of New Jersey as against every comer is sovereign master of the situation."

See also *Economy Light & Power Co.* v. *United States,* 256 Fed., 792, 799 (1919), aff'd 256 U. S., 113 (1921).

In short, the power of Congress to control navigable waters which are a means of commerce and accessible from other states is a power to protect, preserve and improve navigation, not a power to impose obstructions to navigation which the State has expressly forbidden. It results that a State's sanction of a bridge may be annulled in the interests of navigation but a State's veto of a new bridge may not.

POINT II.

The concurrent consent of both State and Federal Governments is necessary before a bridge over navigable waters wholly within one State may be lawfully erected.

The practical effect of the position taken by the Courts below is that the Bridge Act of 1906 (34 Stat., 84), was intended to establish and has established, complete Federal paramountcy, and a complete supersession of all State legislation on the subject of bridges over navigable waters, even where such waters are wholly within one State.

In according the Act of 1906 such a far-reaching effect, it is submitted that the Courts below fell into error. Let us examine successively (1) certain general principles concerning the nature and scope of federal and state power in the premises; (2) the decisions of this Court, prior to 1906, whereby the doctrine of concurrent authorization became the law of the land; (3) the trend of the acts of Congress up to 1906; and (4) the text, legislative history and judicial construction of the Bridge Act of 1906.

1. General Principles.

The source of *Federal power* in the premises is the commerce clause. *Escanaba Company* v. *Chicago,* 107 U. S., 678, 682 (1883). In this case the Court said:

> "The power vested in the general government to regulate interstate and foreign commerce involves the control of the waters of the United States which are navigable in fact, so far as it may be necessary to insure their free navigation, when by themselves or their connection with other waters they form a continuous channel for commerce among the States or with foreign countries."

And see *United States* v. *Rio Grande Irrigation Co.,* 174 U. S., 690, 703 (1899), *post,* pp. 38-39, to which may be added *Leovy* v. *United States,* 177 U. S., 621, 637 (1900), holding a conviction for obstructing a navigable water by building a dam must be set aside because the water obstructed

> "was not shown by adequate evidence to have been a navigable water of the United States, *actually used in interstate commerce* * * *." (Italics ours.)

The source of the continuing *State power* in the premises concurrently with the Federal, is two-fold:

A. *The Police Power.* The Supreme Court of the United States, in *Louisville & Nashville R. Co.* v. *Kentucky,* 161 U. S., 677, 702 (1896), said:

"It has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers. Nearly all the railways in the country have been constructed under state authority, and it cannot be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operation as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbid interference therewith; while to the States remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests.

"If it be assumed that the States have no right to forbid the consolidation of competing lines, because the whole subject is within the control of Congress, it would necessarily follow that Congress would have the power to authorize such consolidation in defiance of state legislation—a proposition which only needs to be stated to demonstrate its unsoundness."*

*We quote at some length from this opinion because of the suggestion of the Circuit Court of Appeals (Rec., p. 110) that the briefer quotation made on our brief below was misleading. With deference, it is submitted that since the case affirmatively upheld a certain form of State regulation against the contention that it burdened interstate commerce, the passage to the omission of which the Court below adverted is a mere dictum and does not lessen the force of the case for the purpose for which we cite it.

The accepted definitions of the police power are, of course, broad enough to embrace the action of the State of New Jersey in the case at bar in (*i*) authorizing the City of Newark to construct and maintain the Port Newark Terminal (Rec., p. 10), and (*ii*) denying to the defendant railroad permission to substitute a new bridge for the existing bridge (Rec., pp. 15-16). For the police power includes the power "to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity." *Barbier* v. *Connolly*, 113 U. S., 27, 31 (1885). And see *Escanaba Company* v. *Chicago*, 107 U. S., 678, 683 (1883), where the Court expressly referred to the continued existence, *after Congressional action*, of the State's power (exercised in this case through a city ordinance) in "matters of internal police." This power, declared this Court, "embraces the construction of * * * bridges * * * and it can generally be exercised more wisely by the States than by a distant authority."

B. *The Inherent Sovereignty of the States.* This aspect of the State's power is described in *Hardin* v. *Jordan*, 140 U. S., 371, 381 (1891); it is particularly well expressed in *People ex rel. Murphy* v. *Kelly*, 76 N. Y., 475, 482 (1879), where the Court of Appeals, in upholding the power of the State to authorize certain municipal corporations to subscribe to stock in the New York Bridge Company in order to finance the Brooklyn Bridge, said:

> "The East river is a public navigable water, and to bridge it required the concurrent authority of the State of New York, and of the United States; of the former, by reason of its rights in the lands on the shore, and under the water, and of its qualified sovereignty over the water; and of the latter, by reason of the exclusive power of

> Congress to regulate commerce, and to determine, in its regulation thereof, to what extent navigation upon the water may be obstructed or interfered with."

And see *International Bridge Co.* v. *New York, ante,* p. 12.

Sub-point B, *supra,* is after all not in essence different from sub-point A; for as TANEY, C. J., observed in the *License Cases,* 5 Howard, 504, 583 (1847).

> "But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions."

2. The Doctrine of Concurrent Authorization had been firmly established by decisions of this Court prior to 1906.

In *Lake Shore & Michigan Southern Railway Co.* v. *Ohio,* 165 U. S., 365 (1897), the Court held that the Act of September 19, 1890 (26 Stat., 426, 453), requiring a permit from the Secretary of War as a prerequisite to the lawful erection of a bridge over navigable waters, did not have the effect of depriving the States of all authority over navigable streams wholly within the State. Mr. Justice WHITE said (p. 369):

> "The construction claimed for the statute is that its purpose was to deprive the States of all power as to every stream, even those wholly within their borders, whilst the very words of the statute, saying that its terms should not be construed as conferring on the States power to give authority to build bridges on streams not wholly within their limits, by a negative pregnant with an affirmative, demonstrate that the object of the act was not to deprive the several States of the authority to consent to the erection of bridges over navigable waters wholly within their territory. To hold that the act manifested an intention on the part of

> Congress to strip the several States of all authority over every navigable stream wholly within the State would require the obliteration of these qualifying words, and would therefore be the creation of a new statute by judicial construction. It follows, therefore, that, even conceding *arguendo* that the words 'navigable waters' as used in the act were intended to apply to streams wholly within a State, its obvious purpose was not to deprive the States of authority to grant power to bridge such streams, or to render lawful all bridges previously built without authority, but simply to create *an additional and cumulative remedy* to prevent such structures, although lawfully authorized, from interfering with commerce." (Italics ours.)

In *Cummings* v. *Chicago*, 188 U. S., 410 (1903), the plaintiff-appellant having secured leave of the Secretary of War to construct a pier in a navigable stream, sought to enjoin the City of Chicago from interfering with the prosecution of the work. The consent of neither the City of Chicago nor the State of Illinois had been secured. The Circuit Court denied relief and this Court affirmed. Mr. Justice HARLAN stated the questions before the Court thus (p. 428):

> "Did Congress, in the execution of its power under the Constitution to regulate interstate commerce, intend by the legislation in question to supersede, for every purpose, the authority of Illinois over the erection of structures in navigable waters wholly within its limits? Did it intend to declare that the wishes of Illinois in respect of structures to be erected in such waters need not be regarded, and that the assent of the Secretary of War, proceeding under the above acts of Congress, was alone sufficient to authorize such structures?"

The answer given to the questions was an emphatic negative, the holding being that Section 10 of the River and Harbor Act* of 1899 (30 Stat., 1151)

*Quoted, in part, in Appendix, *post*, pp. 97-98.

> " • • • is not so worded as to compel the conclusion that Congress intended, by that section, to ignore altogether the wishes of Illinois in respect of structures in navigable waters that are wholly within its limits" (p. 430).

The Court went on to say that (pp. 430-431)

> " • • • we will not at this time make any declaration of opinion as to the full scope of this power or as to the extent to which Congress may go in the matter of the erection, or authorizing the erection, of docks and like structures in navigable waters that are entirely within the territorial limits of the several States. Whether Congress may, against or without the expressed will of a State, give affirmative authority to private parties to erect structures in such waters, it is not necessary in this case to decide. It it only necessary to say that the act of 1899 does not manifest the purpose of Congress to go to that extent under the power to regulate foreign and interstate commerce and thereby to supersede the original authority of the States. The effect of that act, reasonably interpreted, is to make the erection of a structure in a navigable river, within the limits of a State, depend upon the concurrent or joint assent of both the National Government and the state government. *The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must, before proceeding under such an authority, obtain also the assent of the State acting by its constituted agencies.*" (Italics ours.)

The doctrine of the *Cummings* case was reiterated in *Montgomery* v. *Portland*, 190 U. S., 89 (1903), where the Court, after referring to the River and Harbor Act of 1890 relating to the necessity of conforming to regulations made by the Secretary of War in the construction of piers, etc., in navigable waters, expressly held that it

did not follow that Congress intended in such matters to disregard altogether the wishes of the local authorities. The Court said (p. 106):

> "There is nothing in the present case to distinguish it from the *Cummings* case. While section 12 of the act of 1890 forbade the construction or extension of piers, wharves, bulkheads, or other works, beyond the harbor lines established under the direction of the Secretary of War, in navigable waters of the United States, 'except under such regulations as may be prescribed from time to time by him,' it does not follow that Congress intended in such matters to disregard altogether the wishes of the local authorities. Its general legislation so far means nothing more than that the regulations established by the Secretary in respect of waters, the navigation and commerce upon which may be regulated by Congress, shall not be disregarded even by the States. Congress has not, however, indicated its purpose to wholly ignore the original power of the States to regulate the use of navigable waters entirely within their respective limits."

The Court concluded:

> *"We hold that, under existing enactments, the right of private persons to erect structures in a navigable water of the United States that is entirely within the limits of a State, cannot be said to be complete and absolute without the concurrent or joint assent of both the General and state Governments"* (190 U. S. at p. 106; italics ours).

See also *Gring* v. *Ives*, 222 U. S., 365, 367-370 (1912), where the Court unequivocally said that the Act of 1899 did not operate to paralyze all State power concerning structures in navigable waters within their borders.

3. The trend of legislation in Congress since 1880 on the subject of bridges over navigable waters shows consistently a purpose to aid navigation; the development of land commerce has been either subordinated to navigation in these statutes or ignored altogether.

The history of Congressional measures on the subject of navigable waters shows *aid to navigation* as their dominant purpose.*

In 1880 (21 Stat., 180, 197) Congress appended to a Rivers and Harbors appropriation act a provision (Sec. 4) to the effect that:

> "Whenever hereafter the navigation of any river, lake, harbor, or bay, or other navigable water of the United States shall be obstructed or endangered by any sunken vessel or watercraft, it shall be the duty of the Secretary of War * * *"

to order the owner to remove it, or else proceed to remove it himself, using treasury funds for the purpose.

In 1884 (23 Stat., 133, 148) Congress appended to a Rivers and Harbors appropriation act the following provision (Sec. 8):

> "Sec. 8. That whenever the Secretary of War shall have good reason to believe that *any railroad or other bridge* now or hereafter to be constructed over any of the navigable waters of the United States, under authority of the United States or of any State or Territory, *is an obstruction to the free navigation of such waters,* by reason of difficulty in passing the draw-opening or the raft-span of said bridge, by rafts, steamboats, or other water-craft, it shall be the duty of the said Secretary, on satisfactory proof thereof, to require the company or persons owning, controlling, or operating said bridge to cause such aids to the passage of said draw-opening or of

*See in this connection Point V, sub-point 2, *post*, p. 70.

> said raft-span, or of both said draw-opening and raft-span to be constructed, placed and maintained, at their own cost and expense, in the form of booms, dikes, piers or other suitable and proper structures for the guiding of said rafts, steamboats, and other water-craft safely through said opening or span, or both said opening or span as shall be specified in his order in that behalf; and on failure of the company or persons aforesaid to make and establish such additional structures within a reasonable time, the said Secretary shall proceed to cause the same to be built or made at the expense of the United States, and shall refer the matter without delay to the Attorney-General of the United States, whose duty it shall be to institute, in the name of the United States, proceedings in any circuit or district court of the United States in which such bridge, or any part thereof, is located, for the recovery of the cost thereof; * * *." (Italics ours.)

In July, 1888 (25 Stat., 400, 424) Congress appended to a Rivers and Harbors appropriation act a provision (Sec. 9) substantially similar to that in the Act of 1884. The words "under the authority of the United States or of any State or Territory" occurring in the 1884 Act were omitted, doubtless because they were surplusage, or because the law had been clarified by the decision of this Court in *California* v. *Pacific Railroad Co.*, 127 U. S., 1 (April, 1888). The possible modes of obstruction were elaborated to include "by reason of insufficient height, width of span, or otherwise." Certain penal provisions were embodied in Section 10.

In 1890 (26 Stat., 426, 453) Congress appended to a Rivers and Harbors appropriation act a provision (Sec. 4) amending and re-enacting Section 9 of the Act of 1888. The tenor of it remained unchanged. The word "unreasonable" was inserted before the word "obstruction." Before ordering alterations, the Secretary of War was required first to give "the parties reasonable opportunity

to be heard"; alterations to be ordered must be such as will "render navigation * * * reasonably free." In giving notice of his order, the Secretary of War was required to "specify the changes required to be made." Provisions were added relating to

> obstruction of navigation by deposits of refuse (Sec. 6);
> obstruction of navigation by erection of wharves (Sec. 7);
> establishment of harbor lines (Sec. 12).

A development in the direction of far-sightedness is found in Section 7, which provides for preventive relief in addition to the relief by abatement afforded by Section 4. In Section 7 (p. 454) Congress declared:

> "* * * it shall not be lawful hereafter to commence the construction of any bridge, bridge-draw, bridge piers and abutments, causeway or other works over or in any port, road, road-stead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War * * *."

Then follow certain provisos, one of which is to the effect that the act shall not be construed to authorize the construction of a bridge under an act of the legislature of any State over a "navigable water not wholly within the limits of such State."*

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*This more or less cryptic passage was termed by Mr. Justice White "a negative pregnant with an affirmative" and was construed by him to preserve to the the States their authority over navigable streams wholly within their limits. *Lake Shore & Michigan Southern Ry. Co.* v. *Ohio*, 165 U. S., 365, 369 (1897). The passage in question was rephrased in the Act of 1899 so as to express unequivocally the intent which Mr. Justice White had ascertained by inference. See *post*, p. 39.

This proviso has a three-fold importance:

(1) It is the first gesture toward the impairment of a State law relating to navigable waters;

(2) Its tendency is to annul a State's sanction, but not to override a State's veto;

(3) It applies only where the navigable water is *not wholly within the confines of one State.*

In 1892 (27 Stat., 88, 110) Congress appended to a Rivers and Harbors appropriation act a provision (Sec. 3) which, *inter alia,* amended and re-enacted Section 7 of the Act of 1890. The changes were little more than verbal, and the proviso specially referred to above was not altered.

Between the passage of this statute and the next, the Supreme Court handed down its decision in *United States* v. *Rio Grande Irrigation Company,* 174 U. S., 690 (1899) to the effect that the Act of 1892, in making it unlawful to alter or modify the capacity of a navigable water without the approval and authorization of the Secretary of War, prohibited taking the waters of a stream for irrigation purposes without congressional authority even though State assent had been expressly given and even though the water was being diverted at a point some three hundred miles above the navigable portion. The opinion contains (pp. 705-708) a *resumé* of the statutes on the subject. As to the nature of the federal power in the premises, the Court said (p. 703):

> "In other words, the jurisdiction of the General Government over interstate commerce and its natural highways vests in that Government the right to take all needed measures *to preserve the navigability of the navigable water courses of the country even against any state action.* It is true there have been frequent decisions recognizing the power of the State, in the absence of Con-

> gressional legislation, to assume control of even navigable water within its limits to the extent of creating dams, booms, bridges and other matters which operate as obstructions to navigability. The power of the State to thus legislate for the interests of its own citizens is conceded, and until in some way Congress asserts its superior power, and the necessity of preserving the general interests of the people of all the States, it is assumed that state action, although involving temporarily an obstruction to the free navigability of a stream, is not subject to challenge. A long list of cases to this effect can be found in the reports of this court [citing cases]." (Italics ours.)

In 1899 (30 Stat., 1121, 1151) Congress appended to a Rivers and Harbors appropriation act a provision (Sec. 9)* wherein the prohibition against the construction of a bridge over navigable waters was made absolute

> "until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War."

Then follows a proviso whose chief departure from that in the two preceding enactments lies in the substitution of an affirmative for a double negative and in other changes lessening ambiguity. The proviso in the 1899 Act reads:

> "*Provided*, That such structures may be built under the authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced * * *."

*This section and Section 10 are set forth in the Appendix, *post*, pp. 97-98.

Section 10 forbids "the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the navigable waters of the United States"; projection beyond harbor lines may only be built on plans recommended by the Chief of Engineers and authorized by the Secretary of War; the same provision is made regarding the alteration of channels, harbors, *et cetera.* Section 11 relates to the establishment of harbor lines, and for the regulation of projections. Section 12 contains provisions for enforcing the act by penalties and mandatory injunctions. Section 13 forbids the deposits of refuse in navigable waters, with a proviso to the effect that

> "the Secretary of War, whenever in the judgment of the Chief of Engineers *anchorage and navigation will not be injured thereby,* may permit the deposit of material * * * in navigable waters, within limits to be defined * * *." (Italics ours.)

Section 14 forbids interference with wharves, levees and other works used by the United States

> "for the preservation and improvement of any of its navigable waters or to prevent floods, or as boundary marks, tide gauges, surveying stations, buoys," etc.

Section 15 forbids anchoring vessels or floating logs

> "in such manner as to obstruct, impede or endanger navigation."

Section 16 provides penalties for violations of the four preceding sections. Section 17 orders the Department of Justice to enforce the Act. Section 18 provides for the removal or alteration of bridges found by the Secretary of War to be

> "an unreasonable obstruction to the free navigation of such waters," *i.e.,* "navigable waterways of the United States."

Section 19 provides for the removal by the Secretary of War of sunken vessels when thereby the

> "navigation of any river * * * or other navigable waters of the United States shall be obstructed or endangered * * *."

Section 20 allows the Secretary of War, through his agents, in certain emergencies, to remove or destroy vessels which have grounded in any canal, lock, or other navigable waters

> "in such manner as to stop, seriously interfere with, or specially endanger navigation."

and

> "to clear immediately the canal, lock, or navigable waters aforesaid of the obstruction thereby caused * * *."

The concluding paragraph of this section repeals all laws inconsistent with Sections 10 to 20 inclusive.

4. There is absent from the Bridge Act of 1906 any expression of an intent so to change the law as to dispense with State assent. This appears from (A) the Legislative History of the Act, and (B) Decisions Subsequent to Its Enactment.

A. The Bridge Act of 1906 and Its Legislative History.

We come now to the Act of March 23, 1906 (34 Stat., 84), which is printed in full in the Appendix, *post*, pp. 99 *et seq.*, and bears the title: "An Act to regulate the construction of bridges over navigable waters." *This act does not repeal any previous statute.* It has itself never been repealed or amended.

Section 1 may be said to aim primarily at standardization—at making the Congressional consent to bridges thereafter erected conditional upon their conformity to certain requirements. Congress thereby relieved itself from setting forth the requirements every

time it consented to a bridge. This has been the way the Act has operated in practice. Thus in the case at bar Congress in authorizing the proposed bridge merely authorized the defendant railroad to construct, maintain and operate it "in accordance with the provisions of the Act entitled 'An act to regulate the construction of bridges over navigable waters,' approved March 23, 1906."

Section 2 provides:

> "That any bridge built in accordance with the provisions of this Act shall be a lawful structure and shall be recognized and known as a post route, * * *."

The phrase "shall be a lawful structure" has already been discussed herein in Point I at p. 22, *supra.*

Section 3 provides that when one railroad company erects a bridge in conformity with the conditions set forth in the Act, other railroads may, under certain circumstances, secure trackage rights thereon upon paying just compensation.

Section 4 is in substance the same as Section 8 of the Act of 1884. It empowers the Secretary of War to compel the alteration of bridges whenever they

> "in the opinion of the Secretary of War, at any time unreasonably obstruct such [free] navigation on account of insufficient height, width of span, or otherwise * * *."

This section provides also for the lighting and prompt opening of draws, and for the limitation of tolls to reasonable figures.

Section 5 imposes penalties for failure to observe the requirements of the Act. The section contains at the end this sentence:

> "* * * and in case of any litigation arising from any obstruction or alleged obstruction to navigation created by the construction of any

> bridge under this Act, the cause or question arising may be tried before the circuit court of the United States in any district which any portion of said obstruction or bridge touches" (34 Stat., 86).

Section 6 embodies a general time limit within which bridges thereafter authroized must be commenced and completed.

Section 7 defines the word "persons."

Section 8 reserves the right to amend, alter, or repeal the Act as to bridges which may be erected in accordance with its terms. This section recognizes the possibility that a structure may be pronounced lawful and unobstructive of navigation when built, and the contrary found regarding it years later. Cf. *Bridge Company* v. *United States,* 105 U. S., 470, 480 (1881); *Louisville Bridge Co.* v. *United States,* 242 U. S., 409, 425 (1917).

The statute does not say when the consent of Congress is necessary. It begins by saying

> "when, hereafter, authority is granted by Congress * * *."

Hence we must refer to the previous Act of 1899 to ascertain when congressional authority must be sought; and the provisions of the Act of 1899 are neither enlarged nor reduced by the Act of 1906.* Hence, the proviso in Section 9 of the Act of 1899, rendering Congressional consent unnecessary, and the approval of the plans by the Chief of Engineers and the Secretary of War sufficient, where the bridge is to cross waters the *"navigable portions of which lie wholly within the limits of a single State"* is law to-day; and the decisions under the Act of 1899—*Cummings* v. *Chicago* (188 U. S., 410)

*The failure of the Act of 1906 to set up a criterion for the determination of the necessity *vel non* of Congressional consent is one reason why the Act has so rarely been cited in bridge cases arising after its passage. The Supreme Court has based its decisions on the Act of 1899 and its interpretations of the provisions of that Act, and has felt it unnecessary to cite the Act of 1906 which, so to speak, incorporates the earlier Act by reference.

and *Montgomery* v. *Portland* (190 U. S., 89), *ante*, pp. 32 and 33, are still precedents of unimpaired authority.

Since the Act of 1899 was held in the cases last cited not to have effected a supersession of State laws, and since the Act of 1906 appears upon analysis to cover the same ground—which, in fact, are the words the Supreme Court used in reference to it in *Union Bridge Co.* v. *United States*, 204 U. S., 364, 367 (1907), *post*, p. 49—it follows that the failure of the State to consent to the proposed bridge in the case at bar is a circumstance which must be accorded full force and effect. Such a conclusion is necessary if recognition is to be given to the rule which requires an intent on the part of Congress to supersede State laws to be "clearly manifested." *Illinois Central R. R. Co.* v. *Public Utilities Commission*, 245 U. S., 493, 510 (1918), *post*, p. 55. Moreover, it is the only conclusion consistent with logic; for the Act of 1899 is essentially a navigation measure and there is not a single section in the Act of 1906 that is not consistent with that purpose. Even Section 3 relating to the expropriation of trackage rights promotes navigation by making the erection of separate bridges for parallel railroads unnecessary. The same is true of that portion of Section 4 which declares that tolls must be reasonable. This guards against a situation where the exaction of excessive tolls on the only available bridge might result in the erection by persons interested of another bridge in the vicinity, with the resultant inconvenience to navigation. The statute, in short, clearly recognizes the principle stated as long ago as *Lorman* v. *Benson*, 8 Mich., 18, 32 (1860), that the right of navigation is one "to which all others are subservient." This doctrine was quoted with approval in *Scranton* v. *Wheeler*, 179 U. S., 141, 163-164 (1900).

The Act being *in aid of navigation*, is it at all likely that Congress intended State laws imposing conditions on the right of the State's citizens to build bridges should be nullified? Would it *aid navigation* to dispense with the State's consent to a bridge?

Nowhere in this Act is there any statement which can be construed as dispensing with the necessity of State consent.

It is submitted that a reading of this Act of 1906, upon which the special Acts of 1919 and 1921 depend, does not disclose any expression which would justify this Court in extending the power of the United States Government to the exclusion of that of the States. This will become clearer if we examine the Committee Reports and the debates on the bill which became law in 1906.

Reports and Debates.

That Congress had no intention to dispense with the consent of the State to the construction of bridges over navigable waters wholly within its confines, is apparent from the reports which were made in Congress when the bill was under discussion, and from the remarks of the Committee member in charge of the bill in the House when the bill was being debated there. That courts should take judicial notice of such reports and statements was held by the Supreme Court in the recent cases of *United States v. St. Paul, M. & M. Ry. Co.*, 247 U. S., 310, 318 (1918), and *Duplex Printing Press Co.* v. *Deering*, 254 U. S., 443, 474-5 (1921). In the first case the Court said:

> "The remarks of Mr. Lacey, and the amendment offered by him, in response to an objection urged by another member during the debate, were in the nature of a supplementary report of the committee; and as they related to matters of common knowledge they may very properly be taken into consideration as throwing light upon the meaning of the proviso; not for the purpose of construing it contrary to its plain terms, but in order to remove any ambiguity by pointing out the subject-matter of the amendment. This is but an application of the doctrine of the old law, the mischief, and the remedy."

And in the second case the Court, after referring to the dubious value under ordinary circumstances of debates in the Congressional Record, was careful to add the following qualification:

> "But reports of committees of House or Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure. Binns v. United States, 194 U. S., 486, 495. And this has been extended to include explanatory statements in the nature of a supplemental report made by the committee member in charge of a bill in course of passage. Binns v. United States, supra; Pennsylvania R. R. Co. v. International Coal Co., 230 U. S., 184, 198-199; United States v. Coca-Cola Co., 241 U. S., 265, 281; United States v. St. Paul, Minneapolis & Manitoba Ry. Co., 247 U. S., 310, 318" (254 U. S., at pp. 474-5).

The bill, which later became the Act of March 23, 1906, was introduced on December 11, 1905, in the first session of the Fifty-ninth Congress as H. R. 6009 (40 Cong. Rec., pt. 1, p. 309). The bill was introduced by Congressman Mann of Illinois, a member of the Committee on Interstate and Foreign Commerce, and was referred to that Committee. The entire report of the Committee (House Report No. 182, 59th Congress, First Session) is set forth in the Appendix, *post*, pp. 89-92). Its essence is found in this passage:

> "The purpose of the bill is to establish uniform regulations in regard to the construction and operation of bridges over navigable waters when hereafter authorized by Congress. A further purpose is to prevent the cumbering up of the statute books by repeating in each bridge bill the same provisions, and also to shorten the time for considering and reading bridge bills in the two Houses of Congress. Under the practice now in force the Committee on Interstate and Foreign Commerce of the House and the Committee on Commerce of the Senate, having jurisdiction of

bridge bills, require the insertion in each bill of certain provisions. These provisions make the bill long, take up the time of the two Houses of Congress in the reading of them, and add to the length of the laws when enacted.

"The present bill gathers these provisions into one general law, so that hereafter a bill to authorize the construction of a bridge may be in form similar to the following:

> "A BILL to authorize John Doe Railroad Company to construct a bridge across the Richard Roe River, at or near Black Acre.
>
> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the John Doe Railroad Company, its successors and assigns, be, and they are hereby, authorized to construct, maintain and operate a bridge across the Richard Roe River, at or near Black Acre, in the State of ———, in accordance with the provisions of the act entitled 'An act to regulate the construction of bridges over navigable waters, approved ——, ——, nineteen hundred and ——.'"

When the bill was called up in the House on January 29, 1906, other members of the House raised certain objections to the bill, which Mr. Mann answered. The colloquy is to be found in 40 Cong. Rec., pt. 2, p. 1717, from which a lengthy quotation will be found in the Appendix, post, pp. 92-95. The gist of Mr. Mann's explanation is found in this passage:

> "Mr. Garrett: To what extent does the power of the Secretary of War now go on streams wholly within the limits of the State? That is, what is the extent of the power of the respective legislatures of the States and the extent of the power of the Secretary of War in regard to the construction of bridges across streams?
>
> "Mr. Mann: As I said before, the right, so far as the Government is concerned, is a mere license,* a right to prevent the construction of

*See cases cited, *ante*, pp. 24, *et seq.*

> bridges, and under the existing statute the Secretary of War is authorized, so far as the Government is concerned, to give consent to the erection of bridges over any stream wholly within the limits of a State. Of course, *the power to construct the bridges must be derived from the State itself*, but the Government does not interfere with the right to do this. In other words, the power of the Government is not exercised to regulate interstate commerce,* but to prevent the interference with navigation and navigable streams, and the Government merely waives its right in behalf of persons who must obtain their authority elsewhere. [Italics ours.]"

The foregoing excerpts from the Committee Report and from the debates show not the slightest inkling of an intention to make any such far-reaching change in the law as would result if the decision below were allowed to stand. Furthermore, the Acts (41 Stat., 277, 1099) in relation to the proposed Newark Bay bridge follow precisely the abbreviated form which, the report shows, Congress sought by the Act of 1906 to make an available substitute in the future for the more cumbersome form used in the past.

Therefore we feel justified in stating that if the Act of 1906 is construed as working a complete change in the law in derogation of the rights of the State of New Jersey, it will be in spite of the intention of Congress and not in furtherance of such intention.

B. Decisions subsequent to the Act of 1906.

That the Act of 1906 did not change the relative powers of Federal and State governments, but was simply intended to be a codification of existing law and in continuance of the same policy, is further demonstrated by

*That is to say, the object of Congressional solicitude is water-borne rather than land-borne commerce. See *post*, Point V, Sub-Point 2 (p. 70).

the fact that *the decisions of this Court since that Act have continued precisely along the same line, and the cases above referred to as having established the doctrine of concurrent authorization prior to the Act have been cited with approval by this Court as recently as 1920.*

We are not unmindful of the increased power and more detailed control over interstate commerce which Congress has taken to itself in the Transportation Act, 1920. *Dayton-Goose Creek Railway Co.* v. *United States,* 263 U. S., 456, 477-478 (1924). But we must construe the Act of 1906 in the spirit of the time of its passage; and the same is true of the special Acts of 1919 and 1921, for these were specific exercises of a general power for whose limits we are directed to look to the Act of 1906.

In *Union Bridge Co.* v. *United States,* 204 U. S., 364, 367 (1907), Mr. Justice HARLAN, in his statement of the case, set forth the history of legislation on navigable waters (the case before the Court being an information charging wilful failure to alter a bridge found by the Secretary of War to be an unreasonable obstruction to navigation), and said:

> "Finally, we have the act of March 23d, 1906, 34 Stat. 84, c. 1130, §§4, 5, *which covers the same ground as the act of 1899* under which the present information was filed." (Italics ours.)

The Supreme Court of Washington has expressly held that the Act of 1906 has no application to a bridge over navigable waters wholly within one State. In the case of *In re Westlake Avenue, Seattle,* 66 Wash., 277, 119 Pac., 798 (1911), the appellant sought to escape liability to pay an assessment for local improvements on the ground that the improvements included a bridge over a navigable water, and that the City had obtained merely the approval of the Secretary of War for the

structure, and had not obtained the consent of Congress. Appellant cited the Bridge Act of 1906. In overruling this contention the Court said (p. 285):

> "Appellants cite the Act of Congress of March 23, 1906, ch. 1130, 34 Stats. at L., 84, and contend that, by reason thereof, it will be necessary to obtain permission from the national government by special act of Congress before any bridge can be constructed by the city at Fremont and Westlake avenues. *The statute cited has no application to the construction of bridges across navigable waters which lie wholly within the limits of a single state.*" (Italics ours.)

The Court concluded (pp. 287-288):

> "From authorities cited, and the history of Congressional legislation, it is manifest that the national policy as to waters lying wholly within a state has at all times been that the state, or its authorized representatives, shall in the first instance, select locations and adopt plans for bridges, but that prior to actual construction, and for the protection of navigation, such locations and plans shall be approved by the secretary of war."

Another case arising after the passage of the Bridge Act of 1906 is *Chicago Transportation Company* v. *Pennsylvania Company*, 246 Fed., 190 (Dist. Ct., N. Dist. Ill., 1917). In this case the libelants sued for damages to a sailing vessel. The bridge was built in the winter of 1913-1914, and the libelants alleged it unreasonably obstructed navigation in that it offered a clearance of only 120 feet above water, so that the masts of the libelants' vessel were broken in passing under it. The respondents pleaded as a defense (1) that the bridge was authorized by the Secretary of War under the Act of

1899; and in case this should be held insufficient, they pleaded (2) that they had secured the State's consent to the bridge as well. The Court, following *Lake Shore & Michigan Southern Ry. Co.* v. *Ohio, supra,* held the Federal permit by itself insufficient, but held the possession of permits from both governments a complete defense, saying (p. 192):

> "The Chicago river is wholly within the state of Illinois. In 1890 Congress assumed jurisdiction and control over the Chicago river for the purposes of commerce and navigation. The power to permit the construction of a bridge over the river still remains in the state of Illinois, or its municipal agents, but under Act Sept. 19, 1890, c. 907, §7, 26 Stat., 454, Congress having assumed control over the river a bridge could not be constructed until the proposed location and the plans therefor were first submitted to and approved by the Secretary of War in the interest of commerce and navigation. If the Secretary of War found that either the place or the plan of construction would unnecessarily obstruct commerce and navigation, he was in duty bound to withhold his approval, and the bridge could not be constructed notwithstanding the permit from the state. The state has the power to authorize the construction of the bridge; the Secretary of War had the power to permit or refuse to permit the bridge to be built, his discretion being controlled by the effect the proposed bridge would have upon commerce and navigation. It follows that two permits are essential to the construction of such bridges, one by the state, or its authorized agent, and the other by the United States government through the Secretary of War. *The respondents have secured both. The bridge was therefore duly authorized, and was a lawful structure.*" (Italics ours.)

Other cases decided subsequently to March 23, 1906, all of the same tenor as the preceding, are referred to

briefly in the margin.* See also *Stone* v. *Southern Illinois Bridge Co.*, 206 U. S., 267, 274 (1907), *post*, p. 71; *Hubbard* v. *Fort*, 188 Fed., 987 (1911), *ante*, p. 25.

In the case at bar, both Courts below cited the case of *People* v. *Hudson River Connecting Railroad Corporation*, 228 N. Y., 203 (1920), *certiorari* denied, 254 U. S., 631 (1920)—the District Court quoting at length from the opinion, the Circuit Court of Appeals contenting itself with a mere citation of it. Every portion of Judge ELKUS' opinion in this case quoted by the District Judge

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*In *City of Beaumont* v. *Texas & New Orleans R. Co.*, 296 Fed., 523, 526 (E. Dist. Tex., 1924), the Court said: "The statutes passed in execution of that power [commerce clause] provide that, where navigable waters lie wholly within a state, the authority to construct a bridge must be obtained from the state, and plans that illustrate the type and character of the bridge must be submitted to the Secretary of War and the Chief Engineer, whose approval makes the structure a lawful one."

In *Milwaukee* v. *Gimbel Bros.*, 130 Wis., 31, decided December 4, 1906, the Court stated that it had examined certain acts of Congress relating to the erection of structures in navigable waters, and announced as its conclusion regarding them that they "are merely restrictive of certain acts and, on their face, evince no purpose to exclude the States from prohibiting other acts within their borders as deemed necessary for public welfare and safety" (p. 35).

In *Pedrick* v. *Raleigh & Pamlico Sound R. R. Co.*, 143 N. C., 485, decided December 22, 1906, the Court said (p. 511): "It may be proper to say that we do not concur in the view pressed by defendant that the decision of the Secretary of War permitting the location of the bridge is conclusive. The control of its navigable waters is with the State, the authority of the General Government being only cumulative protection from an interference with commerce."

In *Kaw Valley Drainage District* v. *Missouri Pacific Ry. Co.*, 99 Kan., 188 (1916), the Court said (pp. 207-208): "Moreover, while Congress has jurisdiction over interstate commerce, and, with certain familiar exceptions, its control of such commerce is exclusive, yet Congress has expressly extended to the State a part of its regulatory power over bridges like the one in controversy [which was over waters the navigable portions of which were wholly within the State] * * * . This statute [Act of 1899, 30 Stat., 1151] is a specific recognition by Congress itself that notwithstanding its paramount jurisdiction of the means and instrumentalities of interstate commerce, the bridging of navigable waterways is likewise one of vital interest to the States, and that they also have a governmental concern as to proper bridging of such waterways."

In *People* v. *Metropolitan West Side Elevated Ry. Co.*, 285 Ill., 246 (1918), writ of error dismissed for want of jurisdiction, 252 U. S., 573 (1920), the Court said (p. 257): "The subsequent amendatory acts of Congress, including Section 18 of the Act of March, 1899, do not restrict or encroach upon the power the State had, previous to those enactments, been authorized to exercise. Conceding Congress has the power to take sole and exclusive jurisdiction over navigable waters wholly within a State, it has not done so."

was, it is submitted, *obiter dicta,* and quite unnecessary to the decision of the case. In the *Hudson River Connecting* case the State of New York sought to enjoin the construction of a bridge authorized by Congress and approved by the Secretary of War, the right to an injunction being based upon an alleged trepass upon land under water owned by the State. The Court said (p. 224):

> "Can the legislature of New York state interfere with the plenary power of Congress to authorize this bridge for interstate commerce by depriving the corporation, authorized and vested with a grant of franchise from Congress, of the power *intra vires* to avail itself of the franchise by subsequently imposing the penalty of injunction and forfeiture of its charter for exercise of the franchise? The answer must be in the negative."

The only holding in this case is that the State had not effectively substituted its veto for its previously given consent. In the first place the State was "not opposed to the construction of *a* bridge at the location selected" (p. 208). In the second place the State had affirmatively given consent to the construction of a bridge with more than one span at the point in question (Laws of New York, 1913, Chap. 388—the franchise conferred by this Act not being subject to a reserved right to amend, alter or repeal); thereafter the bridge was authorized by Act of Congress (38 Stat., 308) and plans approved by the Secretary of War. *It was only after such approval had occurred that the State attempted to withdraw its consent, but the withdrawal was by an act which was void as an impairment of the obligation of a contract.* The action of this Court in denying *certiorari* (254 U. S., 631) does not mean that this Court sanctioned

every holding in the case. As was said in the recent case of *United States* v. *Carver*, 260 U. S., 482, 490 (1923),

> "The denial of a writ of *certiorari* imports no expression of opinion upon the merits of the case, as the bar has been told many times."

The New York Court of Appeals had reached a clearly correct *result*. This Court, therefore, properly refused to busy itself with the correction of errors in *rationes decidendi*, the end reached being free from error. Moreover, it must not be overlooked that subsequently to the denial of *certiorari* in the *Hudson River Connecting* case this Court handed down its decision in *International Bridge Co.* v. *New York*, 254 U. S., 126 (1920), *ante*, p. 12, and in this decision *Cummings* v. *Chicago, supra*, and *Escanaba Company* v. *Chicago, supra*, were *cited as still having the force of authority.*

POINT III.

An intent to supersede State laws will not be imputed to Congress unless clearly manifested, and necessary to the attainment of the federal purpose.

The conclusion that the Act of 1906 *did not change the law*, and did not abolish the previous rule to the effect that concurrent authorization of State and Federal Governments is necessary in order to legalize the construction of a bridge over navigable waters wholly within the confines of a single State, is the only conclusion which we are permitted to reach, if we desire to avoid a conflict with the well known principle that a supersession of State laws will not be inferred unless the intent of Congress plainly appears, and unless supersession is necessary to the accomplishment of the purpose for which the Federal statute was passed.

The Supreme Court of the United States said in the case of *Illinois Central Railroad Co.* v. *Public Utilities Commission,* 245 U. S., 493, 510 (1918):

> "In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested. Reid v. Colorado, 187 U. S., 137, 148; Cummings v. Chicago, 188 U. S., 410, 430; Savage v. Jones, 225 U. S., 501; Missouri, Kansas & Texas Ry. Co. v. Harris, 234 U. S., 412, 419."

Another case of importance is *Savage* v. *Jones,* 225 U. S., 501 (1912), in which Mr. Justice HUGHES, writing for a unanimous Court, said (p. 533):

> "But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, *such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State.* This principle has had abundant illustration [citing cases]." (Italics ours.)

And see *Gilbert* v. *Minnesota,* 254 U. S., 325, 331 (1920); *Whipple* v. *Martinson,* 256 U. S., 41, 45-46 (1921).

Now principles of statutory construction so fundamental and so often expressed as these must necessarily have been in the minds of the members of Congress when the Act of 1906 was under discussion. Certainly the Hon. Theodore E. Burton, the reputed author of the Act,* must have been cognizant of them. And yet

*"The Acts of 1899 and 1906 were drafted by Honorable Theodore E. Burton of Ohio, long the efficient chairman of the River and Harbor Committee of the House, and an eminent lawyer." 35 Harvard Law Review, 173 (1921).

why would Congress have left to elaboration by inference upon inference what, if really a result of this Act, is at once its most striking and far-reaching result? Why leave to attainment by elastic and extraordinary construction such a radical departure from the pre-existing law? When Congress has desired to annul State legislation, it has usually done so in unequivocal language—witness the Transportation Act, 1920, §407, sub-s. 6 (c) where, after providing for consolidations under orders to be issued by the Interstate Commerce Commission, Congress expressly said: "* * * thereupon such consolidation may be effected * * * *the law of any State or the decision or order of any State authority to the contrary notwithstanding*" (41 Stat., 482).

In *Hagan* v. *City of Richmond,* 104 Va., 723, 52 S. E., 385 (1905) the City of Richmond brought suit against Hagan to recover for the cost of removing by dynamite one of his barges which had sunk in the James River in such a way as to obstruct navigation. Hagan pleaded that the statute under which this suit was brought had been nullified by the River and Harbor Act of 1899. He also pleaded the Act limiting liability to the vessel itself and relieving the owner from personal liability (U. S. R. S., §4283). Judgment in favor of the City was reversed because the latter plea was sustained. In overruling the first defense, the Court said (p. 729):

> "If it had been the design of Congress to deprive the States of the important and essential right to police the rivers and harbors within their respective limits, it is inconceivable that it would have declared that purpose in language of doubtful import * * *. The object of the legislation is to keep the navigable waters of the United States clear and unobstructed; and supplemental legislation on the part of the States in furtherance of that design is in aid of commerce, and where not in conflict with any system adopted by Congress, is universally upheld."

This is in consonance with *Lake Shore & Michigan Southern Ry. Co.* v. *Ohio, ante,* p. 31. It is also in harmony with the sentiments which this Court expressed in *County of Mobile* v. *Kimball,* 102 U. S., 691, 699 (1881), where it was said:

> "The control of Congress over them [navigable waters] is to insure freedom in their navigation, so far as that is essential to the exercise of its commercial power. *Such freedom is not encroached upon by the removal of obstructions to their navigability or by other legitimate improvement.* The States have as full control over their purely internal commerce as Congress has over commerce among the several States and with foreign nations; and to promote the growth of that internal commerce and insure its safety they have an undoubted *right to remove obstructions* from their harbors and rivers, deepen their channels, and improve them generally, if they do not impair their free navigation as permitted under the laws of the United States, or defeat any system for the improvement of their navigation provided by the general government." (Italics ours.)

In *North Shore Boom Company* v. *Nicomen Boom Co.,* 212 U. S., 406 (1909), the plaintiff below obtained an injunction against the construction by the defendant of a log boom within the locality designated in the plat or survey for plaintiff's boom. The defendant sued out a writ of error upon the ground that there was a Federal question in the case—the question whether the obstruction did or did not contravene a Federal statute. The Federal statute legalized booms authorized by the State law; and as it was not denied that this boom was authorized by the State law, this Court properly held that no Federal question was involved. The opinion is of value for the statement (at p. 412) that obstructions in waters entirely within a State may be unlawful by State law, and if an Act of Congress also forbids them

they may contravene both laws—the inference being that subsequent congressional action does not supersede State law, but after congressional action the obstruction, to become lawful, must receive concurrent authorization of both State and Federal governments. The Court said (p. 412):

> "Where there is a Federal law which it is claimed also applies to the subject and requires the consent of the Federal Government, then there is a concurrent or joint jurisdiction of the state and National governments over the erection of a structure which obstructs navigation. *Cummings* v. *Chicago*, 188 U. S., 410; *Montgomery* v. *Portland*, 190 U. S., 89."

A case neatly illustrative of the principles which determine when supersession is to be inferred and when not, is *Missouri, Kansas & Texas Ry.* v. *Haber*, 169 U. S., 613 (1898). Actions were begun by Haber and others for damages caused by the act of the carrier in bringing into the State of Kansas, in violation of a state law, cattle suffering from splenetic fever. The shipment originated in Texas. The Federal Animal Industry Act (26 Stat., 1044, 1049) forbade the shipment in interstate commerce of cattle suffering from a contagious, infectious, or communicable disease, but expressly went on to say that splenetic fever, under certain circumstances, such as prevailed in the case then before the Court, should not be deemed such a disease. The carrier took the position that it could not lawfully have rejected the shipment, and that the Kansas law, in so far as it aimed to forbid what Congress permitted, had been superseded. But this Court held otherwise, pointing out that (p. 623):

> "The act of Congress did not assume to give any corporation, company or person the affirmative right to transport from one State to another State cattle that were liable to impart or capable of communicating contagious, infectious or communicable diseases."

The applicabilty of this observation to the case at bar is clear. Congress, by the Bridge Act of 1906 and the special acts relating to the proposed Newark Bay Bridge, did not give the defendant railroad an "affirmative right" to construct the bridge, but, as Congressman MANN said in the course of the debate referred to *ante*, p. 48, conceded that "the power to construct the bridges must be derived from the State itself."*

It follows that to the attainment of the Federal purpose, which is to aid navigation, a supersession of State laws, enacted to the same end, is not necessary.

POINT IV.

The construction of bridges over navigable waters is a matter requiring not a uniform rule but rather "that diversity which alone can meet the local necessities of navigation." *(Cooley* v. *Port Wardens.)*

We have pointed out (*ante*, p. 44) that the provisions of the Bridge Act of 1906, particularly when viewed in the light of its legislative history, do not show an intention to supersede State legislation and do not require for their efficient operation any judicial holding that State legislation has been impliedly superseded; on the contrary, the Act presupposes the continuing existence of valid State legislation as the source of the affirmative power to build such bridges, Congress merely reserving the right to nullify a State license when such action is deemed necessary to preserve the navigability of a particular river (*ante*, pp. 46 and 57). To require anyone who proposes to obstruct a navigable stream wholly within the confines of a single State, to jump a double hurdle and secure the concurrent authorization of State

*See Point I, *supra*.

and Federal governments, is to promote, and not to thwart, the Federal purpose.

With the foregoing in mind, we approach the following pronouncement of this Court in the *Pilotage* case, *Cooley* v. *Board of Wardens of the Port of Philadelphia*, 12 How., 299, 319 (1851):

> "Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation."

To the question which is propounded by the alternative classification suggested in the passage just quoted, we unhesitatingly answer that the case of bridges is a case *par excellence* for the recognition of "that diversity which alone can meet the local necessities of navigation." And nowhere has this been given fuller effect than in the decision of this Court in *Escanaba Company* v. *Chicago*, 107 U. S., 678, 683 (1882), where Mr. Justice FIELD, writing for a unanimous court, said:

> "But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people. This power embraces the construction of roads, canals, and bridges, and the establishment of ferries, and *it can generally be exercised more wisely by the States than by a distant authority.* They are the first to see the importance of such means of internal communication, and are more deeply concerned than others in their wise management. Illinois is more immediately affected by the bridges over the Chicago River and its branches than any other State, and is more directly concerned for the prosperity of the city of Chicago, for the convenience and com-

> fort of its inhabitants, and the growth of its commerce. And nowhere could the power to control the bridges in that city, their construction, form, and strength, and the size of their draws, and the manner and times of using them, be better vested than with the State, or the authorities of the city upon whom it has devolved that duty. When its power is exercised, so as to unnecessarily obstruct the navigation of the river or its branches, *Congress may interfere and remove the obstruction.* If the power of the State and that of the Federal government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the Constitution to legislation in pursuance of it, as the supreme law of the land. But until Congress acts on the subject, the power of the State over bridges across its navigable streams is plenary." (Italics ours.)

The ferry cases present a ready analogy. As was observed in *Gilman* v. *Philadelphia,* 3 Wallace, 713, 726 (1865):

> "Bridges are of the same nature with ferries, and are undoubtedly within the category thus laid down."

Among the more recent ferry cases is *Port Richmond and Bergen Point Ferry Co.* v. *Hudson County,* 234 U. S., 317 (1914), where this Court upheld the power of the defendant-in-error to fix rates on an interstate ferry. The Court said:

> "Coming then to the question now presented —whether a State may fix reasonable rates for ferriage from its shore to the shore of another State,—regard must be had to the basic principle involved. That principle is, as repeatedly declared, that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive; that, in other matters, admitting of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act; and

that, when Congress does act, the exercise of its authority overrides all conflicting state legislation [p. 330].

* * * * * * *

"It is argued that the mere fact that interstate transportation is involved is sufficient to defeat the local regulation of rates because, it is said, that it amounts to a regulation of interstate commerce. But this would not be deemed a sufficient ground for invalidating the local action without considering the nature of the regulation and the special subject to which it relates. Quarantine and pilotage regulations may be said to be quite as direct in their operation, but they are not obnoxious when not in conflict with Federal rules. The fundamental test, to which we have referred, must be applied; and the question is whether, with regard to rates, there is any inherent necessity for a single regulatory power over these numerous ferries across boundary streams; whether, in view of the character of the subject and the variety of regulation required, it is one which demands the exclusion of local authority. Upon this question, we can entertain no doubt. It is true that in the case of a given ferry between two States there might be a difference in the charge for ferriage from one side as compared with that for ferriage from the other. But this does not alter the aspect of the subject. The question is still one with respect to a *ferry* which necessarily implies transportation for a short distance, almost invariably between two points only, and unrelated to other transportation. It thus presents a situation essentially local requiring regulation according to local conditions" (pp. 331-332).

We are aware that the Court excluded from the scope of its language ferries "operated in connection with railroads, and cases, if any, where the ferriage is part of a longer and more continuous transportation" (p. 331). But is is submitted that a bridge does not lose its local character simply because it is used to carry interstate

commerce. It operates just as much as an obstruction to navigation whether it is used in interstate commerce or not. If a State can abolish grade crossings on an interstate railroad (*Erie R. R.* v. *Public Utilities Comm. of N. J.*, 254 U. S., 394 [1921])—a power, by the way, which this Court was careful to leave unaspersed in *Railroad Comm. of California* v. *Southern Pacific Co.*, 264 U. S., 331, 341 [1924])—it would seem equally reasonable to concede to it the power to prevent the obstruction of a navigable river by a bridge used in interstate commerce. And the existence of that power was admitted in *Lake Shore & Michigan Southern Ry. Co.* v. *Ohio*, *ante*, p. 31.

See to the same effect as the *Port Richmond Ferry* case the case of *Wilmington Transportation Co.* v. *R. R. Comm. of California*, 236 U. S., 151, 154 (1915).

In *Huse* v. *Glover*, 119 U. S., 543, 548-549 (1886), the Court said:

> "The State is interested in the domestic as well as in the inter-state and foreign commerce conducted on the Illinois River, and to increase its facilities, and thus augment its growth, it has full power. *It is only when, in the judgment of Congress, its action is deemed to encroach upon the navigation of the river as a means of interstate and foreign commerce, that that body may interfere and control or supersede it.* * * * How the highways of a State, whether on land or water, shall be best improved for the public good *is a matter for State determination*, subject always to the right of Congress to interpose in the cases mentioned." (Italics ours.)

In thus contending for a rule which will substitute for uniformity a diversity adapted to the local necessities of navigation, we are not running counter to any canon of construction adopted by this Court in constitutional cases. For, as was observed by this Court in *Hammer* v. *Dagenhart*, 247 U. S., 251 (1918):

> "Many causes may co-operate to give one State, by reason of local laws or conditions, an economic advantage over others. The Commerce Clause was not intended to give to Congress a general authority to equalize such conditions [p. 273].
>
> * * * * * * *
>
> "The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution" (p. 275).

And in the *Passenger Cases*, 7 Howard, 283, 428-429 (1848), Mr. Justice WAYNE, in his concurring opinion, said:

> "That is a very narrow view of the constitution which supposes that any political sovereign right given by it can be exercised, or was meant to be used, by the United States in such a way as to dissolve or even disquiet, the fundamental organization of either of the States. The constitution is to be interpreted by what was the condition of the parties to it when it was formed, by their object and purpose in forming it, and by the actual recognition in it of the dissimilar institutions of the States. The exercise of constitutional power by the United States, or the consequences of its exercise, are not to be concluded by the summary logic of *ifs* and syllogisms."

Summarizing the jurisprudence of the last two decades of the nineteenth century and its tendency to sanction the centralization of power in the Federal Government, Charles Warren in his *The Supreme Court in United States History*, Vol. III, p. 353, reaches this conclusion:

> "In fact, there was substantially but one class of cases affecting interstate commerce in which the State powers were upheld, namely those involving the right of the State to control its bridges, wharves and ferries."

POINT V.

The construction of the Act of 1906 contended for by the Appellants is the only one consistent with the Constitution.

To hold that the States must still be appealed to for their consent to bridges over waters whose navigable portions are wholly within their confines, is, we submit, to give the Act of 1906 a construction which is so clearly in furtherance of the intent of Congress, and which makes such a strong appeal to both reason and logic, as to render superfluous any extended demonstration of the constitutional doubts and difficulties which would inevitably arise were a contrary construction allowed to prevail. These doubts and difficulties arise from three fundamental propositions:

1. The nature of local, or State, sovereignty in lands under water.

A nexus of real significance between the bridge and the State and an additional ground for State control, are found in the circumstance (adverted to *ante,* pp. 16, 18 and 19), that the State owns the land under water on which the proposed bridge is to rest. To uphold the unpermitted and uncompensated taking of State lands is to ignore the basic rule that:

> "A man cannot acquire a right to property by his desire to use it in commerce among the States." *Hudson County Water Co.* v. *McCarter,* 209 U. S., 349, 357 (1908).

In this case, a New Jersey statute (L. 1905, c. 238) made it unlawful for anyone to transport by pipe lines the water of any fresh water lake or river of New Jersey

into any other State for use therein. Under this statute, the State Attorney General obtained an injunction which restrained the plaintiff-in-error from carrying out a contract to supply water for Staten Island, N. Y., by means of a main starting in Bayonne, N. J. The plaintiff-in-error's assertion that the statute unduly burdened interstate commerce was rejected in this court. Mr. Justice HOLMES, writing for eight of the Justices, said (pp. 356-357):

> "The problems of irrigation have no place here. Leaving them on one side, it appears to us that few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. Whether it be said that such an interest justifies the cutting down by statute, without compensation, in the exercise of the police power, of what otherwise would be private rights of property, or that apart from statute those rights do not go to the height of what the defendant seeks to do, the result is the same. But we agree with the New Jersey courts, and think it quite beyond any rational view of riparian rights that an agreement, of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the State in which it flows. The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.

> "We are of opinion, further, that the constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the State is not required to submit even to an aesthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will."

To concede to Congress the power to impose obstructions over navigable waters wholly within one State in a case where, as here, the State itself has title to the lands under water on which the obstruction is to be built, is to deprive the States of the power of regulating and conditioning the use of such lands, and to transfer that power to the United States. Yet in an early case in which such an extension of federal power was contended for, this Court flatly rejected the contention. See *Pollard's Lessee* v. *Hagan*, 3 Howard, 212 (1844), holding a patent from the federal government to lands under water in Alabama insufficient to support an action of ejectment. The Court said (p. 230):

> "* * * *This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the States within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it.* To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the States of the power to exercise a

> numerous and important class of police powers. But in the hands of the States this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the constitution. For, although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the constitution of the United States, 'and the laws which shall be made in pursuance thereof.'
>
> "By the preceding course of reasoning we have arrived at these general conclusions: First, The shores of navigable waters, and the soils under them, were not granted by the constitution to the United States, but were reserved to the States respectively * * *." (Italics ours.)

This case was followed and its principle applied in *Shively* v. *Bowlby,* 152 U. S., 1, 48-50 (1894). The same doctrine was expressed in slightly different language in *Van Brocklin* v. *Tennessee,* 117 U. S., 151, 168 (1886), as follows:

> "The rights of local sovereignty, including the title in lands held in trust for municipal uses, and in the shores of navigable waters below high water mark, vest in the State, and not in the United States."

It follows from the preceding that the United States cannot impose its will on the State*, and that the latter's right to prohibit obstructions for which its consent has not been secured is an incident of its sovereignty. See *Weber* v. *Harbor Commissioners,* 18 Wallace, 57, 65 (1873), where the Court said:

> "By that law [the common law] the title to the shore of the sea, and of the arms of the sea, and in the soils under tidewaters is, in England, in the king, and, in this country, in the State. Any

*Cf. opinion of the Judge-Advocate General, *ante*, p. 20.

> erection thereon without license is, therefore, deemed an encroachment upon the property of the sovereign, or, as it is termed in the language of the law, a purpresture, which he may remove at pleasure, whether it tend to obstruct navigation or otherwise."

In *Kansas* v. *Colorado,* 206 U. S., 46 (1907), the complainant sought to enjoin a diversion of water by the defendant, a State situated upstream from the complainant. The United States intervened and asserted a right in the water superior to either State, for the purpose of reclaiming arid public lands.* The Court, after an exhaustive inquiry into the origin and purpose of the Tenth Amendment (p. 90), dismissed the crossbill of the United States on the ground (p. 93) that "each State has full jurisdiction over the lands within its borders, including the beds of streams and other waters," and that whether the common law rule or a modified form thereof prevalent in the western states be adopted by any particular State, it is still true (p. 94) that "Congress cannot enforce either rule upon any State."

In *Alabama Power Co.* v. *Gulf Power Co.,* 283 Fed., 606 (M. Dist. Ala., 1922), in which the constitutionality of the Federal Water Power Act (41 Stat., 1063) was upheld, Judge CLAYTON wrote a comprehensive opinion and examined numerous decisions of this Court. As to federal rights in lands under water, he said (p. 612):

> "Of course, at the time the states formed themselves into a more perfect union under the Constitution, they held the right to their own navigable waters and the beds under them, with the power to use or dispose of them without substantial impairment of the interest of the public in such waters, and the absolute property in and dominion over navigable streams, tidewaters, and

*And not for the purpose of preserving navigability, as in the *Rio Grande* case, *ante*, p. 38.

> the underlying soils were not granted to the general government, but were reserved and now remain in the states or under state sovereignty. * * *"

2. The power of Congress over navigable waters is limited to their improvement for purposes of navigation, including the *removal* of obstructions.

The decisions of this Court sanction but one limitation upon the State's title to land under water. Thus, in *Port of Seattle* v. *Oregon & Washington R. R. Co.*, 255 U. S., 56, 63 (1921), Mr. Justice BRANDEIS, writing for a unanimous court, said:

> "The right of the United States in the navigable waters within the several states is limited to the control thereof for purposes of navigation."

And see other cases to substantially the same effect collected in Judge SANBORN's opinion in *United States* v. *Holt State Bank*, 294 Fed., 161, 164 (C. C. A., 8th Circ., 1923).

The point involved in the *Port of Seattle* case was the nature of a State grant of lands under water lying between the United States pierhead line and the waterway boundary, or bulkhead line, as fixed by the State. The State laws provided for the issuance of licenses for the improvement of lands so situated, but the defendant, or parties in privity with it (who were littoral owners), had erected wharves upon them without license. The Port of Seattle, under State authorization, brought a bill in equity to quiet the State's title to lands thus appropriated. This Court held (1) that the establishment of the pierhead line by the United States did not divest the State's title to land under water between such pierhead line and the bulkhead line; (2) that under State

law a grant of littoral lands carried no title to land below high water mark; (3) that it makes no difference whether the lands acquired by grant from the State are tide lands or not; (4) that it likewise makes no difference whether the waterway is natural or artificial, and in connection with this holding the Court said (p. 69):

> "So far as the pierhead lines are concerned, the Railroad concedes that their establishment by the United States did not create as against the State a right to wharf out. They merely fixed the line beyond which piers might not extend."

The case, therefore, is a distinct authority for the proposition that federal legislation concerning navigable waters does not supersede State legislation on the same subject, and that the intent of Congress was

> "simply to create an additional and cumulative remedy to prevent such structures, although lawfully authorized, from interfering with commerce." *Lake Shore & Michigan Southern Ry. Co.* v. *Ohio*, *ante*, p. 32.

In *Stone* v. *Southern Illinois Bridge Co.*, 206 U. S., 267, 274 (1907), Mr. Justice Day, writing for a unanimous Court, said:

> "Federal control of bridges constructed over navigable waters is maintained because of the right to prevent obstructions to navigation and preserve such public highways as rivers for free and unobstructed use in the interest of commerce."

In *Gibson* v. *United States*, 166 U. S., 269, 271-272 (1897), the Court said:

> "All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various

> States and individual owners under them, it is always subject to the *servitude in respect of navigation* created in favor of the Federal government by the Constitution." (Italics ours.)

In *United States* v. *Rio Grande Irrigation Company*, 174 U. S., 690, 708 (1899), the Court said:

> "Evidently Congress, perceiving that the time had come when the growing interests of commerce required that the navigable waters of the United States should be subjected to the direct control of the National Government, and that nothing should be done by any State tending to destroy that navigability without the explicit assent of the National Government, enacted the statute in question [30 Stat., 1121]."

In *Willink* v. *United States*, 240 U. S., 572, 580 (1916), the same principle was thus restated:

> "The river being navigable and tidal, whatever rights he [appellant's testator] possessed in the land below the mean high-water line were subordinate to the public right of navigation and to the power of Congress to employ all appropriate means to keep the river open and its navigation unobstructed [citing cases]."

See also *Huse* v. *Glover*, *ante*, p. 63.

It is something more than a coincidence that in two comparatively recent instances of congressional legislation affecting rivers, there has been a conscious endeavor on the part of Congress to connect the legislation with the *improvement of navigation*, a cogent admission on the part of the national legislature that its power over rivers and their beds does not extend beyond this. Thus, in *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S., 53, 72-73 (1913), Mr. Justice LURTON said concerning an act for the repair, maintenance and preserva-

tion of certain public works at Sault Ste. Marie (35 Stat., 815):

> "But aside from the exclusive public purpose declared by the eleventh section of the act, the twelfth section declares that the conservation of the flow of the river is 'primarily for the benefit of navigation, and incidentally for the purpose of having the water power developed, either for the direct use of the United States, or by lease * * * through the Secretary of War.' If the primary purpose is legitimate, we can see no sound objection to leasing any excess of power over the needs of the Government."

And in *Alabama Power Co.* v. *Gulf Power Co.*, 283 Fed., 606, 617 (M. Dist. Ala., 1922), the Court (CLAYTON, D. J.) said concerning the Federal Water Power Act, 41 Stat., 1063:

> "Sections 19 and 27 of the act evidence the intention of Congress, while asserting the federal power, to carefully respect the reserved power of the states. These two sections are manifestly the result of a compromise on the part of those Senators and Representatives who held the broadest view of congressional power over the subject and those of their associates most pronounced in desiring to safeguard the rights of the states. But nevertheless the purposes are the improvement and use of navigable streams for commerce, and, incidentally, the subservient use of the superabundant water at the dams for generating power, and in the same connection the intention was to negative the charge of federal usurpation and to distinctly recognize the rights of the state in navigable streams; * * *."

But to his analysis of the nature of the federal paramountcy established by the commerce clause, the learned Judge added this qualification:

> "It is also a settled doctrine that the power of Congress over navigable streams is limited to the protection and improvement of them in the interests of commerce—navigation. * * * Admittedly the federal government can take property necessary for the improvement of the navigability of navigable streams, * * *."

And so citations might be multiplied indefinitely. In no case has this Court perverted a control over navigable rivers, assumed to preserve their navigability, into a power to obstruct navigation against the wishes of the local authorities and in a manner calculated to handicap forever the development, as a port, of the chief city of the State in which the river lies.

3. The failure of Congress to make any provision for just compensation makes it impossible to argue that there has been a valid exercise of the power of eminent domain in the case at bar.

We have already (*ante*, p. 16) adverted to an expression in the opinion of the Court below (Rec., p. 109) which amounts to an implicit holding that the United States had exercised the power of eminent domain in the case at bar. But, surely, if the acts of Congress relating to the proposed Newark Bay Bridge did constitute an exercise of the power of eminent domain on the part of the United States, they are void because they fail to provide for reasonable compensation to the owner of the property taken. As was observed in *Sweet* v. *Rechel*, 159 U. S., 380, 399 (1895):

> "When, however, the legislature provides for the actual taking and appropriation of private property for public uses, its authority to enact such a regulation rests upon its right of eminent domain—a right vital to the existence and safety of government. But it is a condition precedent to

> the exercise of such power that the statute make provision for reasonable compensation to the owner."

Certainly the Fifth Amendment must be held to accord to a sovereign State at least as great protection against the confiscation of its property as is accorded to the citizens of such State. Hence we may properly say that a State is a "person" entitled to the protection of the Fifth Amendment. Cf. *Georgia* v. *Chattanooga*, 264 U. S., 472, 484 (1924). And it is also clear that Congress, in exercising power under the commerce clause, may only do so in subordination to the rights of persons under the Fifth Amendment. Thus in *Monongahela Navigation Co.* v. *United States*, 148 U. S., 312, 336 (1893), the Court said:

> "But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment, * * * ."

And in *United States* v. *Lynah*, 188 U. S., 445, 471 (1903), the Court said:

> "Passing to the third question, it is contended that what was done by the government was done in improving the navigability of a navigable river, that it is given by the Constitution full control over such improvements, and that if in doing any work therefor injury results to riparian proprietors or others it is an injury which is purely consequential, and for which the Government is not liable. But if any one proposition can be considered as settled by the decisions of this court it is that, although in the discharge of its duties the government may appropriate property, it cannot do so without being liable to the obligation cast by the Fifth Amendment of paying just compensation."

The two cases last cited were cited and followed in *United States* v. *Cress*, 243 U. S., 316, 320 (1917).

To *Hammer* v. *Dagenhart*, 247 U. S., 251 (1918), wherein the first Child Labor Act (39 Stat., 675) was adjudged unconstitutional, a brief reference will suffice. The Court's conclusion was:

> "Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend" (p. 276).

The principle followed in reaching this result is succinctly stated at page 274:

> "The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution."

In view, therefore, of the extreme likelihood of conflict with the Fifth and Tenth Amendments if the Act of 1906 were construed otherwise than as contended for in Point II, we are in a position to urge as an additional reason for adopting that construction the rule that

> "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States* v. *Delaware & Hudson Co.*, 213 U. S., 366, 408 (1909); *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S., 204, 217 (1922).

POINT VI.

The Special Acts of 1919 and 1921 show no intention of dispensing with the necessity of State approval and must be construed as merely granting Federal consent without impairing State powers.

The Special Acts of 1919 and 1921 (Appendix, *post*, pp. 107-108) purport to grant authority to the railroad company to construct the bridge in accordance with the provisions of the Bridge Act of 1906. There cannot possibly be gathered from these bills themselves any Congressional intention to override State laws on the subject, for the Act of 1919 is in the precise form recommended for future bridge bills by the House Committee when the Bridge Act of 1906 was under consideration (*ante*, p. 47). It would be absurd to contend that Congress intended to attach any new meaning to the form used beyond that explained by the House Committee when the form was devised by it in 1906. That meaning, as appears from the legislative history of the Bridge Act, was merely a consent by the United States, a granting of one half of the concurrent power necessary to be exercised before the bridge might be lawfully constructed.

In perhaps the majority of instances in which the word "authority" is employed in an Act of Congress, as it was in the Special Act of 1919, it is used in this sense of "approval" or "consent." We need go no further than the Act of 1899, which we have considered, *supra*, p. 39, for clear examples of this use. Section 10 of the Act (Appendix, *post*, p. 97) reads:

> "That the creation of any obstruction not *affirmatively authorized* by Congress, to the navigable capacity of any of the waters of the United

> States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf * * * in any port * * * or other water of the United States * * * except on plans recommended by the Chief of Engineers and *authorized* by the Secretary of War; and it shall not be lawful to excavate or fill * * * any port * * * of the United States, unless the work has been recommended by the Chief of Engineers and *authorized* by the Secretary of War prior to beginning the same." (Italics ours.)

The meaning of the word "authorize" in the section just quoted was the principal question in *Hubbard* v. *Fort* (*ante*, p. 25), where Judge RELLSTAB said (188 Fed., at pp. 993-997):

> "This section was construed in Cobb v. Lincoln Park, 202 Ill., 427, and Wilson v. Hudson County Water Co., 76 N. J. Eq., 543 (the defendant in the last case being the Water Company in the case at bar, and the question there considered being the same as raised here). In both of these it was held that the Secretary of War's *authorization* was a mere license to do the work and not a grant of power to do it.
>
> * * * * * * * *
>
> "It is further contended, however, that the construction thus placed upon section 10 of the act of 1899 is erroneous, and that, first, unless such section be so construed as to empower the Secretary of War to authorize the excavation and filling, etc., of interstate waters in the first instance without resort to Congress, violence will be done to the word 'authorize' as used in that section, in view of the use by Congress of the word 'approve' in section 9, where permission only was intended to be expressed;
>
> * * * * * * * *
>
> "The use of the word 'authorize' instead of 'approve' does not change the Secretary of War's

> act from permissory to plenary. Two of the definitions of the word 'authorize' are to approve of; to *formally sanction.* Cent. Dict. & Cyc." (Italics ours.)*

Furthermore, the use of the expression "affirmatively authorized" in Section 10 of the Act of 1899 is a plain recognition of the other or negative sort of authority, equivalent to consent or approval. When the word "authority" is employed to mean a grant of power rather than a mere license, it is common to couple with it an adjective such as "affirmative," "primary" or "plenary."

The contention of appellee that when Congress used the word "authority" in the Special Act of 1919, it intended to change the law which had existed from the beginning of the government giving to the States control over bridges across navigable intrastate waters, and to take the power over this bridge to itself to the exclusion of the State of New Jersey, is directly answered by the following statement in Judge RELLSTAB's opinion (188 Fed., at p. 997):

> "Something more than a mere change of expression, particularly when the different word is not different in all its meanings, is therefore necessary to show a legislative intent to effect a so radically different purpose."

It is inconceivable that such a sweeping change in the law in regard to navigable waters should have been made thus casually. The Special Acts of 1919 and 1921 were routine legislative business, and framed in the routine wording used ever since 1906.

All that we have said with respect to the constitutional questions involved in the construction of the Bridge Act applies equally to the Special Acts if taken alone.

The Bridge Act of 1906 is the statute to which the appellee railroad must point for its right to disregard New Jersey law, unless this Court is to be asked to shut its

*This is in full accord with the language employed by the Supreme Court in the *Lake Shore* case, *ante*, p. 18.

eyes to the source of the Special Acts, and to read into them a Congressional purpose, which obviously never existed, to exert a plenary power never before attempted to be exercised. The Court below recognized this when it said of the Bridge Act (Rec., p. 107):

> "This is the general bridge act under the authority of which all bridges have since its passage been built. Subsequent acts authorize the construction of particular bridges in accordance with the general provisions of this Act * * * ."

We have already shown (*ante*, pp. 44, 46-48, 55-56; see also *post*, p. 92) that in all the discussion preceding the passage of the Act of 1906, whether in the committee room, at the War Department, or on the floor of Congress, no one ever even referred to what, if appellee's contention is correct, would be the one outstanding, memorable feature of that Act.

If Congress had had the purpose by the Act of 1906 to strip the States of their power over navigable waters wholly within the limits of a single State, it would certainly have expressed itself differently and less ambiguously. Instead of saying in the negative, "that when, hereafter, authority is granted by Congress" to construct a bridge, such bridge "shall *not* be built * * * until the plans * * * have been submitted to the Secretary of War and Chief of Engineers for their approval, nor until they shall have approved such plan," it would naturally have expressed itself in the positive to the effect that bridges, etc., may hereafter be built over any of the navigable waters of the United States under authority of Congress, upon the approval of the plans by the Secretary of War, etc. And in all probability it would have distinctly said that it was meant to include intrastate as well as interstate waters, or would have added a clause expressly dispensing with the necessity of State authority as pointed out in Point III, *supra*. And if Congress had intended by the Special Acts to override an existing law of the State of New Jersey it would have used some

language evincing that intention, rather than the stereotyped form of special bridge act.

It is submitted that none of the Acts "manifest the purpose of Congress to go to that extent under the power to regulate foreign and interstate commerce and thereby to supersede the original authority of the States" (*Cummings* v. *Chicago*, 188 U. S., 410, 431 [1903]).

POINT VII.

Congress, by creating and adopting as its instrumentality the Port of New York Authority, qualified the license granted to the Central Railroad Company of New Jersey by imposing, as an additional requirement, the approval of that body.

Both the Bridge Act of 1906 and the special acts relating to the proposed Newark Bay Bridge (41 Stat., 277, 1099) must be read in the light of the later joint resolutions concerning the Port of New York District (42 Stat., 174, 822, passed respectively August 23, 1921, and July 1, 1922).

In the preamble to the resolution of August 23, 1921, Congress declared, *inter alia:*

> "Whereas since that time the commerce of the port of New York has greatly developed and increased and the territory in and around the port has become commercially one center or district; and
>
> "Whereas it is confidently believed that a better coordination of the terminal, transportation, and other facilities of commerce in, about, and through the port of New York will result in great economies, benefiting the Nation as well as the States of New York and New Jersey; * * *."

By the Joint Resolution of July 1, 1922 (42 Stat., 822) the Congress of the United States approved the

comprehensive plan of the Port Authority which it had theretofore authorized to be made (42 Stat., 174) and stated:

> "The Port of New York Authority is hereby authorized and empowered to carry out and effectuate the same."

That the words "authorized and empowered" were not used by Congress in the sense of giving consent only, is clearly shown by the fact that when the resolution of July 1, 1922, was up for debate in the House, a motion was made by Representative Montague of Virginia (Congressional Record, 67th Cong., 2nd Session, Vol. 62, pp. 7976-7977) to strike out the words "authorized and empowered" and insert "the consent of Congress is hereby given to the * * *," but the proposal failed to pass.

These Joint Resolutions were framed after extensive inquiry, unusual study and full debate. As Chief Justice MARSHALL said of the Act incorporating the Second Bank of the United States, these measures "did not steal upon an unsuspecting legislature, and pass unobserved." *M'Culloch* v. *Maryland*, 4 Wheaton, 316, 402 (1819).

It is alleged in the Complaint (Rec., p. 20) that the construction of the proposed bridge is in conflict with, obstructive of and inimical to the comprehensive plan. This is an allegation of fact which stands admitted by the motion to dismiss. *Chicago Junction Case*, 264 U. S., 258, 262-263 (1924).

Only a greatly diminished benefit would result from the Resolution, therefore, if after an express plan had been formulated, railroads operating in the District subject to the Port Authority were permitted to erect bridges, etc., in accordance with the pre-existing rules, which provided for no submission to any coordinating

body whatsoever. The preambles emphasize the need of coordination. We need not inquire into what would be the effect of a licensing act such as 41 Stat., 277, *passed after* August 23, 1921; it is clear that the state of the law upon the adoption of the Joint Resolution of August 23, 1921, is that no bridge over navigable waters in the Port of New York District can lawfully be constructed unless the consent of the Port of New York Authority, or of the State where the bridge is to be built, is obtained.

The rule that a statute should be so construed as to avoid an unconstitutional divestment of vested rights cannot be urged against this construction, for it must yield before the rule that grants of special franchises are strictly construed in favor of the public right. This doctrine has frequently been applied specifically in the case of bridges. Thus in *Bridge Co.* v. *United States,* 105 U. S., 470, 480 (1881), this Court in upholding the right of Congress to exercise its reserved power to amend the statute authorizing the bridge by compelling the Railway Company to change the structure of the bridge so as to lessen the obstruction of navigation, said:

> "* * * Congress, which alone exercises the legislative power of the Government, is the constitutional protector of foreign and interstate commerce. Its supervision of this subject is continuing in its nature, and all grants of special privileges, affecting so important a branch of governmental power, ought certainly to be strictly construed. Nothing will be presumed to have been surrendered, unless it was manifestly so intended. Every doubt should be resolved in favor of the Government. * * * In the present case the reservation is of power to withdraw the assent which was given, and to direct the necessary modifications and alterations. This was to be done in case the free navigation of the river

> should at any time be substantially and materially obstructed under the authority which was granted. It was originally a proper subject of legislative inquiry whether the resolution made sufficient provision for the protection of commerce."

See to the same effect, *Louisville Bridge Co.* v. *United States,* 242 U. S., 409, 417 (1917), where the same general principle was couched in the following language:

> "* * * Clearly, the acts were passed under the power of Congress, to regulate commerce. That power is a very great power, and in its nature continuing, not being exhausted by any particular exercise. We need not go so far as to say that Congress could not in any case by contract or estoppel prevent itself from modifying or revoking a regulation once made and substituting another in its place without compensation. But when private rights of an indefeasible nature are sought to be derived from regulatory provisions established in the exercise of this power, the case is peculiarly one for the application of the universal rule that grants of special franchises and privileges are to be strictly construed in favor of the public rights, and nothing is to be taken as granted concerning which any reasonable doubt may be raised."

A word as to the proviso in the Joint Resolution (42 Stat., 180) "That nothing therein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement." This proviso must be so construed as not to defeat the purpose of the Joint Resolution. The proviso is intended to preserve the federal paramountcy which takes the form of a power to abolish obstructions licensed by a State and to require the approval of the Secretary of War before certain bridges authorized by the State

may be built; the proviso is also intended to preserve to Congress the right by affirmative action thereafter taken to alter the extent of the concession and to provide for alterations in the comprehensive plan, amounting possibly to its abolition. The proviso is essentially designed to maintain the *status quo* by keeping the existing federal power intact; it is not the purpose of the proviso to enlarge the federal power. It could only do that by superseding existing state laws, and "its purpose to do so" must be "clearly manifested." *Illinois Central R. R. Co.* v. *Public Utilities Commission, ante,* p. 55.

SUMMARY.

The appellants most earnestly point out that in maintaining that the proposed bridge (being over navigable waters wholly within one State) cannot lawfully be erected until the State's authorization is procured, they are supported by deliberate rulings of all three branches of the Government, viz.:

> *The legislative:* "The power to construct the bridges must be derived from the State itself." Congressman Mann, speaking for the Committee on Interstate and Foreign Commerce, *ante,* p. 48.
>
> *The executive:* "The fact is that without the requisite State authority it [the approval of the Secretary of War] is ineffectual." The Judge-Advocate General, *ante,* p. 20.
>
> *The judicial:* "The act does not make Congress the source of the right to build but assumes that the right comes from another source, that is, the State." *International Bridge Company* v. *New York,* 254 U. S., 126, 133, *ante,* p. 15.

As the obstruction of a navigable water may be attended by serious local damage, the soundest possible rule of decision is that it requires the combined authority of State and Federal Governments to *impose* an ob-

struction, but the single authority of Congress to *remove* one.

We contend that the Special Acts of 1919 and 1921 clearly rest for their interpretation upon the Bridge Act of 1906; that the Congressional intent as regards the supersession of State laws by the Bridge Act of 1906 is that such supersession should be confined to State laws sanctioning obstructions which Congress has refused to sanction, and should not be extended to State laws whose purpose is to aid navigation by restricting the creation of obstructions. The burden of Mr. Mann's complaint in giving, as Committee Chairman, an explanation to a fellow-Congressman of the evils at which the 1906 Bridge Bill was aimed, was the too frequent erection without federal approval of bridges interfering with navigation.*

It was error, therefore, for the Courts below so to construe the Act of 1906 and the Special Acts of 1919 and 1921 as to make the permit from the Secretary of War (issued under Congressional authority) virtually a sword with which to flout State sovereignty, instead of regarding it as a mere shield against federal prosecution; and it was error to ignore the Joint Resolutions relating to the Port of New York Authority, and to hold the defendant railroad's conduct lawful though utterly subversive of the Congressional program of co-ordination. Only by a reversal of the decree appealed from can this Court carry out the legislative intent to give in 1906 renewed vitality to the criteria in the Act of 1899, and, by leaving them unaltered, to retain concurrent authorization of bridges by Federal

*"I may say to the gentleman that up to within a few years ago there was no Federal control over the matter of building bridges over streams, and the result was that until Congress assumed control of that matter it became a common thing to erect bridges which did interfere with navigation, and all over the country there are now bridges which do interfere with navigation, put there before Congress prohibited that" (40 Cong. Rec., 1717; for further excerpts from the debate, see Appendix, *post*, pp. 92-95).

and State Governments as an indispensable prerequisite to their legality. And only by such reversal can this Court fully perform its supreme duty

> "to preserve inviolate the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution." *Hammer* v. *Dagenhart*, 247 U. S., 251, 276 (1918).

CONCLUSION.

The final decree appealed from should be reversed with costs, and the cause remanded with directions to reinstate the complaint and proceed to a determination of the controversy upon the merits.

Dated, Newark, N. J., October 10, 1924.

Respectfully submitted,

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Appendix.

1. Report No. 182, 59th Congress, 1st Session.

REGULATION OF CONSTRUCTION OF BRIDGES OVER NAVIGABLE WATERS.

JANUARY 11, 1906.—Referred to the House Calendar and ordered to be printed.

MR. WANGER, from the Committee on Interstate and Foreign Commerce, submitted the following

REPORT

[To accompany H. R. 6009.]

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H. R. 6009) to regulate the construction of bridges over navigable waters, beg leave to report the said bill back with sundry amendments.

A similar bill was reported from this committee, with a favorable recommendation, February 24, 1905, and was passed by the House but too late in the session to receive consideration in the Senate. The bill has the approval of the Secretary of War and the Chief of Engineers, as appears by the indorsements made a part of this report.

The purpose of the bill is to establish uniform regulations in regard to the construction and operation of bridges over navigable waters when hereafter authorized by Congress. A further purpose is to prevent the cumbering up of the statute books by repeating in each bridge bill the same provisions, and also to shorten the time for considering and reading bridge bills in the two Houses of Congress. Under the practice now in force the Committee on Interstate and Foreign Commerce of the House and the Committee on Commerce of the Senate, having jurisdiction of

bridge bills, require the insertion in each bill of certain provisions. These provisions make the bill long, take up the time of the two Houses of Congress in the reading of them, and add to the length of the laws when enacted. [Italics ours.]

The present bill gathers these provisions into one general law, so that hereafter a bill to authorize the construction of a bridge may be in form similar to the following:

> A BILL to authorize John Doe Railroad Company to construct a bridge across the Richard Roe River, at or near Black Acre.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the John Doe Railroad Company, its successors and assigns, be, and they are hereby, authorized to construct, maintain and operate a bridge across the Richard Roe River, at or near Black Acre, in the State of ——, in accordance with the provisions of the act entitled 'An act to regulate the construction of bridges over navigable waters, approved ——, ——, nineteen hundred and ——.'

Of course Congress will have the authority in any special bill to put in special or general provisions, and that may be properly done when there arises some special occasion calling for the exercise of such authority.

Under existing law no bridge is authorized to be built without first receiving authority from Congress, over any of the navigable waters of the United States *which do not lie wholly within the limits of a single State.*

It is not considered by your Committee desirable that the whole authority, as to the location of bridges, shall be turned over to the War Department; but under the pending bill it is provided that when authority to construct a bridge has been granted by Congress the plans and specifications for such bridge, as well as the actual location, shall be submitted to the Secretary of

War and the Chief of Engineers and shall be approved by them before the work of construction can begin. The bill reserves to the Secretary of War and the Chief of Engineers the right to order changes to be made in the bridge at any time in the interest of navigation.

The bill also provides that the owners of the bridge shall be liable for any damage to private property caused by the construction, maintenance, or operation of the bridge; also that the bridge may be used by the Government, both for telegraph and telephone lines, without expense; also that the bridge shall be open to all telegraph lines and telephone lines on equal terms; also that the bridge shall be a post route and that no charge shall be made against the Government for the carriage of mail or transportation of military supplies or other governmental matter at a higher rate than is charged on the roads approaching the bridge; also that suitable lights and signals shall be maintained on the bridge; also that the draw on the bridge, if it shall be a draw bridge, shall be opened upon reasonable notice; together with a number of other provisions such as are now usually inserted in special bridge bills passed by Congress.

In order to establish uniformity in reference to the construction of bridges and also to economize the time of Congress and reduce the length of bills and statutes, your committee respectfully recommends the passage of the bill, which has been approved by the Secretary of War and the Chief of Engineers, with the amendments suggested by them. [Italics ours.]"

Amend by striking out of line 25 on page 3 the word "then" and inserting in lieu thereof the words "such tolls shall be reasonable and just and."

Amend by inserting in line 25, page 3, after the word "time," the words "and from time to time."

Amend by striking out of line 19, page 4, the words "as an obstruction to navigation."

Amend by striking out of line 7, page 7, the words "the chief of engineers or."

Amend by striking out of line 12, page 5, after the word "district," the word "in."

[Second Endorsement]

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, January 5, 1906.

Respectfully returned to the Secretary of War.

It is understood that the object of the accompanying bill, H. R. 6009, Fifty-ninth Congress, first session, "To regulate the construction of bridges over navigable waters," is simply to combine in one law the provisions under which all bridges hereafter authorized by Congress across navigable waters shall be constructed. [Italics ours.]

After careful consideration I see no objection to favorable consideration of the bill by Congress.

A. MACKENZIE,

Brig.-Gen., Chief of Engineers, U. S. Army.

[Third Endorsement]

WAR DEPARTMENT,
January 6, 1906.

Respectfully returned to the chairman, Committee on Interstate and Foreign Commerce, House of Representatives, inviting attention to the foregoing report of the Chief of Engineers, U. S. Army.

ROBERT SHAW OLIVER,
Assistant Secretary of War.

2. Debates (40 Cong. Rec., Pt. 2, p. 1717).

Mr. Garrett: Mr. Speaker, may I ask the gentleman a question?

The Speaker *pro tempore:* Does the gentleman yield?

Mr. Mann: I yield.

Mr. Garrett: To what extent does the power of the Secretary of War now go on streams wholly within the limits of the State? That is, what is the extent of the power of the respective legislatures of the States and the extent of the power of the Secretary of War in regard to the construction of bridges across streams?

Mr. Mann: *As I said before, the right, so far as the Government is concerned, is a mere license, a right to prevent the construction of bridges, and under the existing statute the Secretary of War is authorized, so far as the Government is concerned, to give consent to the erection of bridges over any stream wholly within the limits of a State. Of course,* THE POWER TO CONSTRUCT THE BRIDGES MUST BE DERIVED FROM THE STATE ITSELF, *but the Government does not interfere with the right to do this. In other words, the power of the Government is not exercised to regulate interstate commerce, but to prevent the interference with navigation and navigable streams, and the Government merely waives its right in behalf of persons who must obtain their authority elsewhere.* [Italics ours.]

Mr. Sheppard: Mr. Speaker, may I ask the gentleman a question?

Mr. Mann: I yield to the gentleman.

Mr. Sheppard: Under the gentleman's bill, what opportunity would one have to express his opposition to certain bridge bills? Would he have to go to the Secretary of War?

Mr. Mann: Under this bill, Mr. Speaker, there must still be a bill passed through Congress in each case. It has not been considered desirable by the committee reporting the bill to transfer the whole authority to the Secretary of War. I may say to the gentleman that up to within a few years ago there was no Federal control over the matter of building bridges over streams, and the result was that until Congress assumed control of that matter it became a common thing to erect bridges which did interfere with navigation, and all over

the country there are now bridges which do interfere with navigation, put there before Congress prohibited that. *Finally Congress passed a law providing that no bridges should be built across navigable streams until the consent of Congress should be obtained, except that in rivers wholly navigable within a State the Secretary of War might give that consent. This bill simply provides that when Congress shall hereafter grant authority to build a bridge it shall be upon the terms named in this bill, the terms being those usually insisted upon by the committee of the two Houses having jurisdiction, and by Congress itself.* [Italics ours.]

Mr. Sheppard: And special bills must be introduced hereafter?

Mr. Mann: Special bills will still have to be brought in, the theory of the committee being that the Member of Congress from the district is, after all, the best one to judge in ordinary cases as to whether the bridge should be permitted to be constructed at all at the place, but that uniform regulations ought to be provided in those cases, unless exceptional circumstances exist; and if exceptional circumstances do exist in any case, the Member of Congress from the district who introduces the bill can make provision for that in his bill and show the exceptional circumstances.

Mr. Sheppard: How will a saving of time be effected if bills must still be introduced as heretofore and receive consideration as heretofore?

Mr. Mann: As I say, we passed through the last Congress 100 different bridge bills. The ordinary bill covers from one to five pages of the bill page size, and covers a considerable space in the statutes. If this bill be enacted into law all that will be required in an ordinary case will be the introduction of a bill which will read like this:

Be it enacted, etc., That the John Doe Railroad Company, its successors and assigns, be and they are hereby, authorized to construct, maintain, and operate a bridge across the Richard Roe River, at

or near Black Acre, in the State of——, in accordance with the provisions of the act entitled 'An act to regulate the construction of bridges over navigable waters, approved ——, ——, 19—.'

3. New Jersey Laws of 1860, Chapter 64.

A further supplement to an act entitled, "An act to incorporate the Somerville and Easton Railroad Company," passed February twenty-sixth, eighteen hundred and forty-seven.

1. Be it enacted *by the Senate and General Assembly of the State of New Jersey,* That it shall and may be lawful for the Central Railroad Company of New Jersey to extend their railroad from some point in their track in the City of Elizabeth, to some point or points on New York bay, in the County of Hudson, at or south of Jersey City; and for that purpose, in its construction and completion, maintenance, use and enjoyment, all and every provision of the act entitled, "An act to incorporate the Somerville and Easton Railroad Company," and of the several supplements thereto, shall extend and be applicable to the railroad now authorized to be constructed, in every respect as if the same had been originally authorized under the said act to which this is a supplement.

2. *And be it enacted,* That the said railroad company shall construct a suitable bridge over any navigable water that they may cross, with a pivot draw with two openings, each of seventy-five feet in width, at right angles to the main channel, located at a point convenient for navigation; and for the safety of persons navigating the said river or water, the said company shall cause to be kept a red light at each outer side of said draw, and a white light on each inner side of said draw, which shall be lighted every evening before it grows dark, and kept lighted till daylight; and shall keep or cause to be kept at such bridge, a

careful person or persons to open such draw for the free passage of vessels with standing masts; and for each and every wilful neglect to light the said lamp or lamps for one night, or to open said draw, the company shall forfeit and pay the sum of fifty dollars, to be recovered, with costs, in any court having jurisdiction thereof, by any person who shall sue for the same, within six months from the time of such neglect.

3. *And be it enacted,* That it shall be the duty of said company, for the accommodation of commuters and the local travel, to continue their early morning and evening trains from and to Somerville and New York, at least as early in the morning as seven o'clock from Somerville, and as late in the evening from New York as four and a half o'clock.

4. *And be it enacted,* That nothing herein contained shall be construed to prejudice the claims of riparian shore owners, and that in constructing their said railroad in the County of Hudson, they shall not cross the Jersey City and Bergen Point plank road more than once, and shall not construct said road nearer than one thousand feet from a parallel line with the said plank road, except where it may cross the same.

5. *And be it enacted,* that this act shall take effect immediately.

Approved February 23, 1860.

4. Excerpt from the Act of Congress of March 3, 1899.

(Rivers and Harbors Appropriation Act,
30 Stat., 1151.)

* * * * * * * * *

SEC. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And provided further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War.

SEC. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor

lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

* * * * * * * * *

Approved, March 3, 1899.

5. Act of Congress of March 23, 1906, known as the "Bridge Act of 1906."

(34 Stat., 84)

CHAP. 1130. An Act To regulate the construction of bridges over navigable waters.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That when, hereafter, authority is granted by Congress to any persons to construct and maintain a bridge across or over any of the navigable waters of the United States, such bridge shall not be built or commenced until the plans and specifications for its construction, together with such drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject, have been submitted to the Secretary of War and Chief of Engineers for their approval, nor until they shall have approved such plans and specifications and the location of such bridge and accessory works; and when the plans for any bridge to be constructed under the provisions of this Act have been approved by the Chief of Engineers and by the Secretary of War it shall not be lawful to deviate from such plans, either before or after completion fo the structure, unless the modification of such plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War.

SEC. 2. That any bridge built in accordance with the provisions of this Act shall be a lawful structure and shall be recognized and known as a post route, upon which no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States than the rate per mile paid for the transportation over any railroad, street railway, or public highway leading to said bridge; and the United States shall have the right to construct,

maintain, and repair, without any charge therefor, telegraph and telephone lines across and upon said bridge and its approaches; and equal privileges in the use of said bridge and its approaches shall be granted to all telegraph and telephone companies.

SEC. 3. That all railroad companies desiring the use of any railroad bridge built in accordance with the provisions of this Act shall be entitled to equal rights and privileges relative to the passage of railway trains or cars over the same and over the approaches thereto upon payment of a reasonable compensation for such use; and in case of any disagreement between the parties in regard to the terms of such use or the sums to be paid all matters at issue shall be determined by the Secretary of War upon hearing the allegations and proofs submitted to him.

SEC. 4. That no bridge erected or maintained under the provisions of this Act shall at any time unreasonably obstruct the free navigation of the waters over which it is constructed, and if any bridge erected in accordance with the provisions of this Act shall, in the opinion of the Secretary of War, at any time unreasonably obstruct such navigation, either on account of insufficient height, width of span, or otherwise, or if there be difficulty in passing the draw opening or the draw-span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the Secretary of War, after giving the parties interested reasonable opportunity to be heard, to notify the persons owning or controlling such bridge to so alter the same as to render navigation through or under it reasonably free, easy, and unobstructed, stating in such notice the changes required to be made, and prescribing in each case a reasonable time in which to make such changes, and if at the end of the time so specified the changes so required have

not been made, the persons owning or controlling such bridge shall be deemed guilty of a violation of this Act; and all such alterations shall be made and all such obstructions shall be removed at the expense of the persons owning or operating said bridge. The persons owning or operating any such bridge shall maintain, at their own expense, such lights and other signals thereon as the Secretary of Commerce and Labor shall prescribe. If the bridge shall be constructed with a draw, then the draw shall be opened promptly by the persons owning or operating such bridge upon reasonable signal for the passage of boats and other water craft. If tolls shall be charged for the transit over any bridge constructed under the provisions of this Act, of engines, cars, street cars, wagons, carriages, vehicles, animals, foot passengers, or other passengers, such tolls shall be reasonable and just, and the Secretary of War may, at any time, and from time to time, prescribe the reasonable rates of toll for such transit over such bridge, and the rates so prescribed shall be the legal rates and shall be the rates demanded and received for such transit.

SEC. 5. That any person who shall fail or refuse to comply with the lawful order of the Secretary of War or the Chief of Engineers, made in accordance with the provisions of this Act, shall be deemed guilty of a violation of this Act, and any persons who shall be guilty of a violation of this Act shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished in any court of competent jurisdiction by a fine not exceeding five thousand dollars, and every month such persons shall remain in default shall be deemed a new offense and subject such persons to additional penalties therefor; and in addition to the penalties above described the Secretary of War and the Chief of Engineers may, upon refusal of the persons owning or controlling any

such bridge and accessory works to comply with any lawful order issued by the Secretary of War or Chief of Engineers in regard thereto, cause the removal of such bridge and accessory works at the expense of the persons owning or controlling such bridge, and suit for such expense may be brought in the name of the United States against such persons, and recovery had for such expense in any court of competent jurisdiction; and the removal of any structures erected or maintained in violation of the provisions of this Act or the order or direction of the Secretary of War or Chief of Engineers made in pursuance thereof may be enforced by injunction, mandamus, or other summary process, upon application to the circuit court in the district in which such structure may, in whole or in part, exist, and proper proceedings to this end may be instituted under the direction of the Attorney-General of the United States at the request of the Secretary of War; and in case of any litigation arising from any obstruction or alleged obstruction to navigation created by the construction of any bridge under this Act, the cause or question arising may be tried before the circuit court of the United States in any district which any portion of said obstruction or bridge touches.

SEC. 6. That whenever Congress shall hereafter by law authorize the construction of any bridge over or across any of the navigable waters of the United States, and no time for the commencement and completion of such bridge is named in said Act, the authority thereby granted shall cease and be null and void unless the actual construction of the bridge authorized in such Act be commenced within one year and completed within three years from the date of the passage of such Act.

SEC. 7. That the word "persons" as used in this Act shall be construed to import both the sin-

gular and the plural, as the case demands, and shall include municipalities, quasi municipal corporations, corporations, companies, and associations.

SEC. 8. That the right to alter, amend, or repeal this Act is hereby expressly reserved as to any and all bridges which may be built in accordance with the provisions of this Act, and the United States shall incur no liability for the alteration, amendment, or repeal thereof to the owner or owners or any other persons interested in any bridge which shall have been constructed in accordance with its provisions.

Approved, March 23, 1906.

6. New Jersey Laws of 1914, Chapter 123.

An Act to create the New Jersey Harbor Commission and to define its powers and duties.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey.*

1. The Governor, with the advice and consent of the Senate, shall appoint five persons, not more than three of whom shall be of the same political party, residents of this State for at least five years previous to appointment, who shall constitute the New Jersey Harbor Commission. * * *

3. It shall be the duty of the commission to investigate and report annually to the Legislature the condition of the water front or harbor facilities, and any other matter incident to the movement of commerce upon all navigable rivers and waters in this State, or bounding thereon, and to recommend to the Legislature, and to the various municipalities of this State interested therein, such measures as may, in the judgment of the commission, be necessary or advisable for the preservation of proper navigation or its improvement, or the improvement of the movement of commerce upon such waters, and, concurrently with the Riparian Commission of this State, or any board or body which may succeed to the powers of said commission, the commission created by this act shall have power, by appropriate action in any court, to prevent encroachment or trespass upon the water front of any of the navigable waters of this State, or bounding thereon, or upon the riparian lands of this State, and to compel the removal of any such encroachment or trespass, and to restrain, prevent and remove any construction, erection or accretion injurious to the flow of any such waters which may be detrimental to the proper navigation thereof, and the maintenance and improvement of commerce thereon.

4. All plans for the development of any water front upon any navigable water or stream of this State, or bounding thereon, which is contemplated

by any person, corporation or municipality, in the nature of individual improvement or development, or as a part of a general plan which involves the construction, change, alteration or modification of a dock, wharf, pier, bulkhead, bridge, pipe line, cable, or any other similar or dissimilar water front development, to be undertaken subsequent to the passage of this act shall first be submitted to the said commission, and no such development or improvement enumerated within the provisions of this section, or included within a proper interpretation thereof, shall be commenced or executed without the approval of this commission first had and received, or as hereinafter provided. Upon the presentation of plans for any such improvement, the commission shall forthwith consider the same, and shall, if necessary or desirable, hold public meetings for consideration thereof, under such rules and regulations as the commission may establish. Before any plans are approved or disapproved, the commission shall have power, except as hereinafter provided, to direct such changes or alterations in the plans submitted as it may deem necessary or advisable, as a condition precedent to approval. * * * Any development or improvement enumerated within the provisions of this section, or included within a proper interpretation thereof which shall have been commenced or executed without first obtaining approval as provided in this section, shall be deemed to be a purprestur and a public nuisance and shall be abated in the name of the State of New Jersey in such action as shall be appropriate for that purpose; *provided, however*, this section shall not apply to, or affect, any development for docks, shipping and transportation facilities heretofore inaugurated by a municipality, which is under construction in whole or in part, if such municipality has, prior to the passage of this act, filed with the Secretary of State a map showing the lands proposed to be taken for such municipal development.

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Approved April 8, 1914.

7. New Jersey Laws of 1915, Chapter 242.

An Act creating a department to be known as the Board of Commerce and Navigation, and vesting therein all the powers and duties now devolved, by law, upon the Board of Riparian Commissioners, the Department of Inland Waterways, the Inspectors of Power Vessels, and the New Jersey Harbor Commission.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. A department of commerce and navigation is hereby established, and the same shall be governed by a board to be known as the 'Board of Commerce and Navigation.'

* * * * * * * * *

5. The Board of Commerce and Navigation shall succeed to and exercise all the powers and perform all the duties now exercised and performed by or conferred and charged upon the Board of Riparian Commissioners, the Department of Inland Waterways, the Inspectors of Power Vessels, appointed under chapter ninety-one of the laws of one thousand nine hundred and six, and the acts amendatory thereof and supplementary thereto, and the New Jersey Harbor Commission (with which last-named commission the New Jersey Ship Canal Commission was consolidated, by the provisions of chapter two hundred fifty-one of the laws of one thousand nine hundred and fourteen).

* * * * * * * * *

13. Whenever, in any act, the words, the 'Board of Riparian Commissioners,' the 'Department of Inland Waterways,' the 'Inspectors of Power Vessels,' the 'New Jersey Harbor Commission,' and the 'New Jersey Ship Canal Commission,' are used, the same shall be taken to be and to mean the Board of Commerce and Navigation.

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Approved April 8, 1915.

8. Special Act of Congress of August 8, 1919.

(41 Stat., 277.)

CHAP. 42.—An Act To authorize the Central Railroad Company of New Jersey to construct a bridge across the navigable waters of the Newark Bay, in the State of New Jersey.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That authority be, and is hereby, granted to the Central Railroad Company of New Jersey, a corporation organized and existing under the laws of the State of New Jersey, its successors and assigns, to construct, maintain, and operate a bridge, and approaches thereto, across the Newark Bay, in the State of New Jersey, at a point suitable to the interests of navigation between the city of Elizabeth, in the county of Union, and the city of Bayonne, in the county of Hudson, in said State, in accordance with the provisions of the Act entitled "An Act to regulate the construction of bridges over navigable waters," approved March 23, 1906.

Sec. 2. That the right to alter, amend, or repeal this Act is hereby expressly reserved.

Approved, August 8, 1919.

9. Special Act of Congress of February 15, 1921.

(41 Stat., 1099.)

CHAP. 47.—An Act to extend the time for the construction of a bridge across the navigable waters of the Newark Bay, in the State of New Jersey.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the times for commencing and completing the construction of a bridge authorized by Act of Congress approved August 8, 1919, to be built by the Central Railroad Company of New Jersey, across the Newark Bay between the city of Elizabeth and the city of Bayonne, New Jersey, are hereby extended two and five years respectively, from the date of approval of this Act.

Sec. 2. That the right to alter, amend, or repeal this Act is hereby expressly reserved.

Approved, February 15, 1921.